

No. 16478 ✓

United States
Court of Appeals
for the Ninth Circuit

DONALD W. FORMHALS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Transcript of Record

Upon Appeal from the United States District Court
for the Southern District of California
Central Division

FILED

SEP 25 1959

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court for the Southern District of California, Central Division

No. 26930—CD

February, 1958, Grand Jury

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD W. FORMHALS,

Defendant.

INDICTMENT

(U.S.C., Title 18, Sec. 1709—Embezzlement of Mail)

The grand jury charges:

Count One

(U.S.C., Title 18, Sec. 1709)

On or about June 25, 1958, in Riverside County, California, within the Central Division of the Southern District of California, defendant Donald W. Formhals, a Postal Service employee, embezzled a letter addressed to Herbert W. Armstrong, "The World Tomorrow," a nation-wide broadcast, P. O. Box 111, Pasadena, California, with return address of Jessie M. Hollifield, 356 N. Hemet Street, Hemet, California, which letter had been intrusted to him and which had come into his possession intended to be conveyed by mail.

Count Two

(U.S.C., Title 18, Sec. 1709)

On or about June 25, 1958, in Riverside County,

California, within the Central Division of the Southern District of California, defendant Donald W. Formhals, a Postal Service employee, embezzled a letter addressed to Cal Farley's Boys Ranch, P. O. Box 1890, Amarillo, Texas, with return address of Mr. and Mrs. Louis Parker, 325 South Buena Vista, Hemet, California, which letter had been intrusted to him and which had come into his possession intended to be conveyed by mail.

Count Three
(U.S.C., Title 18, Sec. 1709)

On or about June 25, 1958, in Riverside County, California, within the Central Division of the Southern District of California, defendant Donald W. Formhals, a Postal Service employee, embezzled a letter addressed to Air Mail from God Mission, Inc., Post Office Box 2013, Los Angeles 54, California, with return address of Mrs. Jessie Hollifield, 356 N. Hemet Street, Hemet, California, which letter had been intrusted to him and which had come into his possession intended to be conveyed by mail.

A True Bill.

/s/ GEORGE E. BATTLES,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

[Endorsed]: Filed July 2, 1958.

[Title of District Court and Cause.]

MINUTES OF THE COURT—JULY 21, 1958

Present: Hon. Peirson M. Hall, District Judge.

Proceedings: For arraignment and plea.

Defendant is arraigned and states his true name is as set forth in the Indictment.

On the Court's own motion It Is Ordered that cause is continued to July 22, 1958, 10 a.m., for plea, and that defendant secure counsel.

JOHN A. CHILDRESS,
Clerk.

By /s/ S. W. STACEY,
Deputy Clerk.

[Title of District Court and Cause.]

MINUTES OF THE COURT—JULY 22, 1958

Present: Hon. Peirson M. Hall, District Judge.

Proceedings: For plea.

Defendant pleads not guilty to each of the three counts of the Indictment.

It Is Ordered that cause is set for trial Aug. 12, 1958, 10 a.m.

JOHN A. CHILDRESS,
Clerk.

By /s/ S. W. STACEY,
Deputy Clerk.

[Title of District Court and Cause.]

ORDER APPOINTING PSYCHIATRIST

The defendant Donald W. Formhals having appeared in this Court on July 22, 1958, and entering a plea of not guilty to all counts of Indictment No. 26930—CD, charging him with violations of 18 U.S.C., Section 1709, Embezzlement of Mail, and the matter having been set for trial on August 12, 1958; and on August 12, 1958, the question of the ability of the defendant Donald W. Formhals to presently defend himself and assist his counsel in the preparation and presentation of his defense and said defendant's mental condition at the time of the alleged defense, having been raised in open court on motion of the plaintiff and agreed to by counsel for the defendant; and the trial setting of August 12, 1958, having been then vacated due to the hospitalization of the defendant; and the defendant being now released from the hospital and the matter set for trial on February 17, 1959, in the District Court of Southern District of California, Central Division;

It Is Ordered that Dr. Edwin E. McNiel be, and he is hereby appointed to examine the defendant and render to the above Court a report of his examination and findings as to the present competency of the defendant with specific reference to his ability to presently defend himself, or to assist his counsel in the preparation and presentation of his defense, and, as to the defendant's mental condition at the time of the commission of the alleged offense.

It Is Further Ordered that the defendant makes himself available for examination by Dr. Edwin E. McNiel on or before February 13, 1959.

It Is Further Ordered that such examination and report shall be at the expense of the United States Government.

It Is Further Ordered that the original of this report shall be forwarded to the Honorable Ben Harrison, Judge of the above-entitled Court, and a copy thereof to respective attorneys for the plaintiff and the defendant.

Dated: This 4th day of Feb., 1959.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved:

/s/ HARRY L. HUPP,
Attorney for the Defendant.

/s/ WM. BRYAN OSBORNE,
Attorney for the Plaintiff.

Certificate of Service by Mail attached.

[Endorsed]: Filed February 4, 1959.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Donald W. Formhals, guilty, as charged

in Count One of the Indictment, and guilty, as charged in Count Two of the Indictment, and guilty, as charged in Count Three of the Indictment.

Dated: February 19, 1959.

/s/ CARL V. GEBHART,
Foreman of the Jury.

[Endorsed]: Filed February 19, 1959.

United States District Court for the Southern District of California, Central Division

No. 26930—Criminal

UNITED STATES OF AMERICA

vs.

DONALD W. FORMHALS

JUDGMENT AND COMMITMENT

On this 9th day of March, 1959, came the attorney for the government and the defendant appeared in person and by his appointed counsel, Harry L. Hupp, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and verdict of guilty on Counts One, Two and Three of 3-count indictment, of the offenses of having on or about June 25, 1958, in Riverside County, California,

while a Postal Service employee, embezzled letters intrusted to him and which had come into his possession intended to be conveyed by mail, in violation of U. S. Code, Title 18, Section 1709, as charged in the Indictment and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months on each of the three counts, to run concurrently.

It Is Adjudged that the bond of the defendant is exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WM. M. BYRNE,

United States District Judge.

[Endorsed]: Filed March 9, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

I.

The Appellant is Donald W. Formhals, and his address is 1346 East Mayberry, Hemet, California.

II.

The attorneys for Appellant are Anderson, Adams & Bacon and Thomas E. Kellett, whose address is 4100 North Rosemead Boulevard, Rosemead, California.

III.

The appellant was charged with three counts of having, on or about June 25, 1958, in Riverside County, California, while a postal service employee, embezzled letters entrusted to him which had come into his possession, intended to be conveyed by mail, in violation of U. S. Code, Title 18, Section 1709.

IV.

On March 9, 1959, judgment was entered whereby it was adjudged that Appellant was guilty as charged and convicted of all three counts, and that he has been committed to the custody of the Attorney General, or authorized representative, for imprisonment for a period of six months on each of the three counts, the sentence on each count to run concurrently.

V.

The Appellant is presently confined at the Federal Correctional Institution, Terminal Island, California.

VI.

The above-named Appellant hereby appeals to the United States District Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: March 18, 1959.

ANDERSON, ADAMS &
BACON and
THOMAS E. KELLETT,

By /s/ ROBERT L. BACON,
Attorneys for Appellant.

Proof of Service by Mail attached.

[Endorsed]: Filed March 19, 1959.

Edwin Ewart McNiel, M.D.
3875 Wilshire Boulevard
Los Angeles 5, California
DUnkirk 9-6493

February 13, 1959.

Honorable Ben Harrison
United States District Judge
600 Federal Building
Los Angeles 12, California

In re: Donald W. Formhals, Case No. 26930
—CD.

Your Honor:

In response to an order from Judge Peirson M. Hall appointing me as a psychiatrist to examine Donald W. Formhals, I proceeded to examine him on February 10, 1959, at my office. Judge Hall ordered that the original copy of my report be forwarded to you.

Personal History:

The subject is a thirty-four year old, white male, who stated he was born December 11, 1924, in Lewis, Iowa. He is a high school graduate. He came to California in August, 1949. He served four years in the United States Marine Corps and six years in the United States Air Force. He has worked as a driver's license clerk for the Iowa State Highway Patrol; he has also done restaurant work and construction work. Since June, 1954, he worked as a mail clerk and carrier for the United States Post Office at Hemet, California, until his arrest in June, 1958.

Marital History:

On December 23, 1950, he married Ruby Gordon. He has a step-son, now age sixteen years, by his wife's first marriage. There are no children by this marriage. He is still living with his wife. He stated that his marriage has gone "fine."

Family History:

Father: William Formhals. He is living in Omaha, Nebraska, at the age of fifty-six years. He

is a caretaker for a big estate. He has remarried twice.

Mother: Eleanor Chubbick. She is living in Atlantic, Iowa, at the age of fifty-four years. She and the subject's father were divorced when the subject was two years of age. She has remarried.

Siblings: The subject is the older of two in his sibling group. He has one full sister.

The subject stated that his maternal grandmother was a patient in the Iowa State Hospital. He thinks that she entered the hospital when she was thirty or forty years of age. He also stated that he thinks she recovered but that no one would take her out of the hospital. There is no other family history of nervous or mental disease.

Medical History of Defendant:

He had the measles, mumps, chicken-pox, scarlet fever, whooping cough and pneumonia in childhood. He stated that he has never had an operation. He sustained fractures of three or four ribs in 1945 while in the Service. Also, he sustained fractures of some of his fingers while playing ball. In August 30, 1950, he was involved in an auto accident. He stated that he suffered a concussion and bruises and was rendered unconscious for about an hour. He stated that he thinks he has recovered from that injury. He said that he had a pinched nerve from the rib injury and had some paralysis of the right side. This was corrected. He also stated that he had

some dizzy spells beginning two or three weeks after the head injury. He said that he did not seem to respond to the orders of his superior officer at March Field and he was seen by a Dr. Rudin. He said that he is now at the California State Department of Mental Hygiene. The subject stated that he quit going to the doctor after three or four sessions. He said that he has never had any fits, convulsions or epileptic attacks. He also stated that he has had no other head injury with unconsciousness and he thinks that he has now recovered from the effects of the head injury. He said that he has "nerves" and headaches. He thinks the headaches are due to the "nervousness." He stated that the headaches occur every day. They have been in the frontal area "right above my eyes." He said that he takes bufferin for his headaches. He said, "Bromo-Seltzer helps more than anything." He also takes Probanthine and Phenobarbital which he says helps the headaches. He said, "Most of the headaches go with my stomach trouble. If I have one, I have the other. They tried to fit me with glasses and I've had three pair of glasses. They help if I'm sitting and reading for the past three or four years." He stated that he has never had any venereal disease and has never been a patient in a mental hospital. He stated that he entered the Veterans' Administration Hospital in Long Beach on September 3, 1958, for treatment of a gastric ulcer. He stated that he has known that he had an ulcer since 1948 or 1949. He was in the Veterans' Ad-

ministration Hospital until November 13, 1958. He returned there on November 30, 1958, and left there December 24, 1958. He had atropine, gelusil and a special diet. He stated that he did not have an operation on his stomach. He stated that he also has internal and external hemorrhoids. While in the Service he was in a hospital from November, 1953, to January, 1954, with hepatitis. He said that he has had no other serious illnesses or accidents.

Previous Arrests:

None.

Service Record:

In February, 1943, he voluntarily enlisted in the United States Marine Corps. His highest rating was that of Corporal. He spent thirty months in the Western Pacific in active combat in landings. He received an honorable discharge in February, 1947. In March, 1948, he voluntarily enlisted in the United States Air Force. His highest rank was Staff Sergeant. In June, 1954, he received an honorable discharge. He did office work and all his service was in the United States. He stated that he had no serious disciplinary difficulties while he was in the Service. He said that there was a minor problem which worked out.

Use of Alcohol and Drugs:

He denied ever having used drugs or marijuana. He stated that he used to use alcoholic beverages

socially. He said that he has not used alcoholic beverages during the last six years.

Present Mental Status:

(a) Orientation: He was oriented for time and place.

Question: "What is the date?"

Answer: "February 10, 1959."

Question: "What is this address?"

Answer: "3875 Wilshire Boulevard."

(b) Manner, attitude, demeanor and appearance, co-operativeness:

The subject was quiet, pleasant and co-operative. He answered questions promptly and relevantly.

(c) Delusions and hallucinations:

Careful inquiry was made as to the existence at any time of delusions or hallucinations. No history of delusions or hallucinations was elicited.

(d) Emotional reactions:

At the time this man was examined he was not pathologically elated or depressed. No evidence of dissociation was noted.

(e) Insight into his present situation:

Question: "Why are you before the Court at this time?"

Answer: "Supposedly embezzlement of mails—that's what the charge is."

Question: "What do they say you did?"

Answer: "The charge reads 'Removed two dollars from a letter in the outgoing mail.'"

Question: "Is there only one count?"

Answer: "They say there were three letters removed from the mail."

Question: "When was that supposed to happen?"

Answer: "June 25, 1958."

Question: "Did the postal inspectors approach you when you had the mail on your person?"

Answer: "Yes, I was sitting on the toilet in the post office in Hemet with a bunch of these letters in my hand."

Question: "Was that on June 25, 1958?"

Answer: "Yes."

Question: "Did you know what you were doing at that time?"

Answer: "No. I didn't. I remember leaving for the bathroom but if I opened any mail I never knew it."

Question: "What time of the day was this?"

Answer: "I started casing the outgoing mail at 2:30 p.m. It was some time after that."

Question: "Was it about a half hour or an hour after that?"

Answer: "Probably about an hour after I started."

Question: "During that hour, from the time you started to case the mail until the inspectors approached you, did you know what you were doing?"

Answer: "Yes, I'd been casing the mail for ten minutes or so and one of these diarrhea spells hit me and I went to the bathroom. I had to go again. I was nervous and upset. I had been in an argu-

ment with the Postmaster. I was dizzy and upset. I started for the bathroom and I layed the mail down that I had in my hand. I flushed the toilet once. I was sitting there. These two inspectors came out of a closet there. I'd layed the letters down on the sink. He grabbed the mail and asked me why I was in there with mail. I told him I'd been sick. He said, 'Let's go in the Postmaster's office.' I was upset and bawling and trying to find out what it was all about. They asked me if I'd like to go around on the outside so I wouldn't have to be going in front of people. In the Postmaster's office they questioned me about where I was born and my years in the Service and when I started stealing from the mail. I told them I never had done that. They talked to each other. He asked me what I would do if they let me go. I pointed my finger at my head like I would shoot myself. Then I promised them I would go home. I sat out in the car with my head on the steering wheel. He came and talked with me. Finally I started home. On the way I stopped and sat in the car and cried. I went home and my wife could see I'd been crying and I couldn't make up my mind to tell her and what to say. This man finally called at 2:30 a.m. and told us to come to a motel. He had me sign papers and told me to appear before the Commissioner in Riverside. He talked for a while and finally I got quieted down and we drove home. The next day we went to Riverside. I went before the Commissioner.

"Later we came to Los Angeles and went before a Judge. Then I went all to pièces. I couldn't get

settled down so that I could talk any sense to my attorney. I had diarrhea and anemia and nervousness. I kept having confused spells. Finally, they got me into the hospital in Long Beach.”

Question: “Today is your mind clear?”

Answer: “Oh, in a way. I’m just nervous and upset. My memory isn’t any good any more. When I talk, I just wander off.”

Question: “What isn’t clear?”

Answer: “Things I should remember—like my dad’s and mother’s birthday and my sister’s. I just haven’t got it any more.”

Question: “In what way is your mind not clear today?”

Answer: “I don’t know. I don’t know how to explain it.”

Question: “Today do you think you know the difference between right and wrong?”

Answer: “Well, yes.”

Question: “Do you think you are able to cooperate with your attorney in the preparation and conduct of your defense?”

Answer: “I have no choice, but I’m sure I’ll break down and cry. I just get so no one can talk to me. When I get like that, my wife just walks away from me. I’ve done a lot of silly things. I’ve threatened my wife and done a lot of stuff like that.”

Question: “Do you think you knew what you were doing on June 25, 1958, between 2:00 p.m. and 4:00 p.m.?”

Answer: “I certainly don’t. I couldn’t have.”

Question: “That doesn’t make sense does it?”

Answer: "You don't understand."

Question: "You told me above a detailed description of a lot of things that happened during those two hours didn't you?"

Answer: "Yes. I knew what I was doing up until those inspectors came at me. I admit I took that mail in the bathroom."

Question: "What don't you remember?"

Answer: "Opening a letter and taking the money out of it."

Question: "Where was the opened letter?"

Answer: "With the others that I had in my hand and that later was put on the wash basin."

Question: "Where was the money?"

Answer: "They said it was in my shirt pocket; later the inspector had it in the Postmaster's office."

Question: "As I understand it, about all you claim to not have memory for is for the actual alleged act of opening the letter and taking out the money?"

Answer: "Yes, that's it."

Sexual History:

In response to questioning the subject stated that he first had sexual relations at the age of twenty-six after he got married. He claimed that he has never had sexual relations with another girl or woman. He claimed that their sexual relations are satisfactory. He also claimed that he is potent, that is, he is generally able to have a satisfactory erection and achieve an ejaculation. He stated that he

has trouble with ejaculatio praecox and with not being able to have an ejaculation. He said, "I end up with cramps in my lower abdomen." He claimed that they engage in the usual or normal type of sexual relations and he denied oral-genital relations. He also denied ever having had homosexual relations.

Question: "How old were you when you started to masturbate?"

Answer: "I never did that I know of."

Question: "Did you ever have a nocturnal emission or a wet dream?"

Answer: "I never did but once and that was overseas."

This examiner read written material which he believes to be true copies of excerpts from the defendant's Veterans' Administration Hospital record. The examiner also discussed the events of the alleged crime with one of the Postal Inspectors who took this man into custody.

Opinion:

At the time I examined this man he was oriented, quiet, pleasant and cooperative. He answered questions promptly and relevantly. No history of delusions or hallucinations was elicited. He was not pathologically elated or depressed. No evidence of dissociation was noted. He was able to relate substantially the events before and after a portion of the alleged crime. For the portion where he was

sitting on the toilet, he claims that he does not remember.

From my present information there is, in my opinion, no evidence of any psychosis existing in this man at any time. He gives this examiner the impression of being a man of weak character and having a passive, dependent type of personality. However, with my present knowledge of the facts it is my opinion that he is able to presently defend himself and assist his counsel in the preparation and presentation of his defense. In my opinion, he was probably legally sane at the time of the commission of the alleged offense. In my opinion, such a claim of selective amnesia for a portion of the time during which the alleged crime was committed is usually not a valid evidence of a true mental illness existing at that time.

Respectfully submitted,

/s/ EDWIN E. McNIEL, M.D.

[Endorsed]: Filed February 19, 1959.

In the United States District Court, Southern
District of California, Central Division

No. 26930—Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD W. FORMHALS,

Defendant.

Honorable William M. Byrne, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Tuesday, February 17, 1959

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,

United States Attorney; by

WILLIAM B. OSBORNE,

Assistant United States Attorney.

For the Defendant:

HARRY L. HUPP, ESQ.

* * *

NORMAN H. WILSON

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Osborne:

Q. Mr. Wilson, what is your occupation?

A. Postmaster, Hemet.

Q. For how long have you been engaged in that occupation?

A. In the postal service approximately 32 years.

Q. How long have you been engaged as a postmaster? A. Three years.

Q. Do you know the defendant in this action?

A. I do. [6*]

Q. How long have you known the defendant?

Mr. Hupp: Excuse me for interrupting, Mr. Osborne.

Mr. Wilson, will you keep your voice up, please, so I may hear you?

The Witness: Yes.

What was that last question?

Q. (By Mr. Osborne): For how long have you known the defendant in this action?

A. Since his employment in the Hemet post office, which was June 1, 1954.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Norman H. Wilson.)

Q. Now, what was the nature of Mr. Formhal's duties in the post office?

A. As a postal clerk he was engaged in sorting mail, dispatching mail; sorting and dispatching mail.

Q. What were his duties on the 25th of June?

A. Dispatching outgoing mail.

Q. Did you have occasion to observe the defendant on the 25th of June? A. I did.

Q. Will you explain what you saw? First of all, prior to 4:30?

A. I observed my employee at his stated duties.

Q. When did you next see the defendant?

A. I saw the defendant immediately after lunch.

Q. What time was that? [7]

A. That would be 12:45.

Q. Did you make any specific assignment of work that afternoon? A. I did.

Q. What was that?

A. Dispatching the mail.

Q. Will you explain what dispatching the mail is?

A. Dispatching the mail is that this clerk works at a case with a number of pigeon holes and he dispatches the individual letters to various towns, states, cities.

Q. How does he manually perform this?

A. Can I stand up and show them?

Q. You certainly may.

A. For instance, if this is a case right here, it is full of pigeon holes, the letters are cancelled by

(Testimony of Norman H. Wilson.)

a cancelling machine and they are all put in a rather long, lengthy bunch of letters; the employee picks up a handful of letters, and taking each individual letter, dispatches them to the various pigeon holes. The case has approximately 100 and some separations.

Q. What was the source of these letters which would be before him, how had they arrived?

A. The letters before him could have come out of our main letter drop or been brought in by numerous collection boxes throughout the city of Hemet. [8]

* * *

Cross-Examination

By Mr. Hupp:

Q. Mr. Wilson, are you aware and were you aware—perhaps I should say were you aware at about the time this alleged [24] offense took place whether or not Mr. Formhals had a health problem?

A. Well, will you explain that a little fuller, please?

Q. Did Mr. Formhals ever discuss his health problems with you?

Mr. Osborne: Your Honor, I am going to object to the introduction of this type question at this time. There is no issue as to the defendant's health.

The Court: Overruled. I assume it is a preliminary question.

The Witness: I would state that his health on this day in particular was no different—

(Testimony of Norman H. Wilson.)

Mr. Hupp: Please, Mr. Wilson.

Let me have the reporter read the question and see if you can answer that question.

(The question referred to was read by the reporter, as follows:

“Q. Did Mr. Formhals ever discuss his health problems with you?”)

The Witness: Not with me personally, no.

Q. (By Mr. Hupp): Did he ever ask you for time off from work to see the doctor?

A. Yes.

Q. Did you inquire as to what the problem was?

A. Yes. [25]

Q. What was the problem?

A. I think he had a tendency towards stomach trouble. Stomach trouble.

Q. As a matter of fact, he told you he had ulcers, didn't he?

A. I could have been apprised that they were ulcers.

Q. As a matter of fact, you and he discussed this, did you not, because you had ulcers, too, at least you discussed this problem because you had similar problems, is that not so?

A. I don't recall those exact conversations.

Q. On the date of this alleged offense, Mr. Wilson, had Mr. Formhals discussed his physical state with you at all?

The Court: Counsel, I overruled the objection because I assumed that it was a preliminary ques-

(Testimony of Norman H. Wilson.)

tion. But if it is just a condition whether he had ulcers, or the condition of his ulcers, I don't see the relevancy of the question.

Mr. Hupp: May it please the Court, Mr. Formhals' physical and mental state at the time of the alleged offense is the gist of the defense. It will be the defense contention that Mr. Formhals was not in the mental state to have the intent necessary to commit the alleged crime.

The Court: Do you mean that he was worrying about his ulcers? [26]

Mr. Hupp: Considerably more than that. We will have a doctor here this afternoon to set forth the problems in some detail.

The Court: Let's not go into that. You may proceed with your examination. [27]

* * *

WILLARD W. LYNCH

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Osborne:

Q. Mr. Lynch, what is your occupation?

A. Postal Inspector, Post Office Department.

Q. Where is your office?

A. My office is in Los Angeles, this building.

(Testimony of Willard W. Lynch.)

Q. How long have you been engaged in this occupation?

A. I have been a postal inspector about 11 years and in the postal service about 22 years.

Q. Directing your attention to the 25th of June last year, do you recall where you were at that time? A. I was at Hemet, California.

Q. What was the nature of your business there? [29]

A. I was investigating the reported losses of patrons of that city wherein there were complaints of first-class letter mail containing cash. We had as many as eight or 10 such losses, actual complaints, over a period of a few months prior thereto.

Mr. Hupp: May the latter statements after the witness said he was in Hemet, California, to this date go out as hearsay?

The Court: Denied.

Mr. Hupp: May it please the Court, what I am getting at of course is the inspector obviously is relying on other information as to these losses, and he is not testifying from his own personal knowledge.

The Court: He is testifying as to what he was doing. He testified that he was out there inspecting for the purpose of investigating the losses that had occurred prior to this time.

Q. (By Mr. Osborne): Mr. Lynch, do you have a standard procedure or system by which you go about investigating these losses?

(Testimony of Willard W. Lynch.)

A. Yes, sir.

Q. Tell us what it is.

A. The complaints of postal patrons are closely observed and analyzed on a continuing basis for all post offices, and I am charged with specifically this type of work [30] in several counties, including Riverside County, in which Hemet is located, and for that reason, and only that reason, I was in Hemet, California.

Q. Will you explain to us what these procedures are after you arrive at the station which is involved?

A. There is an analysis of the complaints with a view to determining some type pattern. Also with a view to determining the responsibility, the personnel, if it is happening within our postal service, and any and all possible steps, with a view to getting the answer and discontinuing these depredations on the mails.

Q. Specifically, what steps do you take in order to pin down the source of these complaints?

A. Once a suspect is developed, a suspect or suspects would be developed, then there is certainly no direct approach, but there is an undercover testing approach.

Q. Will you explain that, please?

A. And we test the suspects.

Q. Will you explain that testing?

A. Yes. Test letters are used only by our service. They appear like any other type letter. They are prepared in accordance with the type mail which

(Testimony of Willard W. Lynch.)

is being lost, and they are placed in postal channels so as to reach the desired person in an unsuspecting manner. If it is a clerk within the postal service, there are different ways in which the [31] test letter may reach his access. If it is a carrier, it reaches his access on the street, usually.

Q. Now, on the 25th of June did you have occasion to prepare these test letters?

A. Yes, two such letters were prepared.

Q. Did you make a notation as to the mailing of those letters?

A. Yes, sir. All particulars of the two test letters were pre-described prior to placing them in the mails for access.

Mr. Osborne: Your Honor, may this be marked Government's Exhibits 3-A and -B for identification?

The Clerk: Government's Exhibits 3-A and 3-B marked for identification.

(The exhibits referred to were marked Government's Exhibits 3-A and 3-B for identification.)

Mr. Osborne: I submit Government's Exhibits 3-A and 3-B to counsel for his inspection.

Q. Mr. Lynch, I show you Government's exhibits for identification 3-A and 3-B and ask you if you recognize those documents.

A. Yes. This is our regular form on which there is a pre-description.

Q. Does your signature appear thereon?

(Testimony of Willard W. Lynch.)

A. Yes, it does. [32]

Q. What are these documents? A. Sir?

Q. What are these documents?

A. These documents are descriptions of each test letter. There are two in question.

Q. In connection with these two, I show you Government's Exhibits 2-A through -F and ask you if you recognize these letters.

A. Yes, this is a test letter and this was a test letter——

The Court: You say "this is a test letter"; will you identify that?

The Witness: Yes. I prepared that.

Q. (By Mr. Osborne): What exhibit is that you are referring to? A. This is Exhibit 2-A.

Q. 2-A? A. Yes, sir.

Q. Does that refer to—which memo?

A. That refers to this one, sir (indicating).

Q. 3-B? A. 2-A and 3-B, yes.

Q. Very well. Now go ahead.

A. This is the other description of the other test letter, which test letter is in pieces, in which two currency [33] notes—it was my money, and still my money, and which were placed in this letter prior to any testing or any access. As I say, we always use our own money, and it is still my money.

The Court: You are referring to exhibit number what?

The Witness: 2-F.

Mr. Hupp: The defendant will stipulate he may get his money back at the end of the trial.

(Testimony of Willard W. Lynch.)

The Witness: I will get it back.

It is related to 2-A.

Q. (By Mr. Osborne): Did you prepare these letters yourself?

A. Yes, in company with Inspector Dow.

Q. What steps did you take after that?

A. At 3:30 p.m., 6/25/58, this letter——

Q. Which one is that?

A. This is the one which is in pieces.

(Continuing): ——was deposited by me in the lobby drop of the Hemet post office at 3:30 p.m. intact. This letter was deposited at 3:40 p.m., 10 minutes later, in the outside courtesy box in front of the Hemet post office.

Q. In regards to the other exhibits which are there before you, can you explain those?

A. I had nothing to do with those letters, and I never saw those letters prior to their recovery from Mr. [34] Formhals. These are actual bona fide letters mailed by patrons of Hemet. There are four of them. I have since had correspondence with these people, and I have letters to the effect—as to their mailing.

Q. After you had deposited these letters in the mail drops, what did you then do?

A. We then entered the observation gallery from the rear of the Hemet post office building, which is off the rear platform, and proceeded immediately after 3:40 p.m., proceeded to observe Mr. Formhals specifically.

(Testimony of Willard W. Lynch.)

Q. Will you explain what this observation gallery is and where it is located?

A. The observation gallery in a post office is a channel, it is just that, it is a gallery, look-out, a hallway from which postal inspectors may observe the operations without their presence known to anyone in the post office, and there are louvers or small windows from which this observation is made.

Q. Where was this observation gallery in relation to the men's room?

A. In the Hemet office the observation is directly over the one side. It is an L-effect, like this (indicating), and as you enter the look-out, this is a hallway, the men's room is right here at the very rear of the building (indicating). [35]

Q. From that, your position in the observation room, were you able to hear the noises in the men's room?

A. Yes. One may even see from two different louvers certain points in the men's room.

Q. Before we go on, approximately what time was it when you went into the observation gallery?

A. A minute or so after 3:40 p.m.

Q. For how long a time did you remain there?

A. Until 4:30, half past 4:00.

Q. During that period of time what did you observe?

The Court: This is a good time to recess.

During the recess period keep in mind the admonition heretofore given. Do not discuss the case

(Testimony of Willard W. Lynch.)

or form an opinion until the case is finally submitted to you.

We will recess until 2:00 p.m.

(An adjournment was taken at 12:00 o'clock noon to 2:00 o'clock p.m.) [36]

* * *

Direct Examination
(Resumed)

By Mr. Osborne:

Q. Mr. Lynch, when we broke for lunch, [44] I believe you were at a point in your testimony where you were in this observation gallery, and I believe I had just asked you the question, what did you observe?

A. We entered the observation gallery at the rear of the Hemet post office about 3:40 p.m., after the two letters in question had been deposited at 3:30 and 3:40. It was about 4:15 when I saw Mr. Formhals while working at this out-going letter distribution case place a letter, one letter, into his right side pocket. I saw that from the louver of the look-out gallery. The two of us between us had binoculars, and while one would be using the binoculars, the other one had to use his normal vision. That was about 4:15. About 4:30—do you want me to go on?

Q. Please do.

A. About 4:30 p.m. Mr. Formhals entered, left the outgoing letter distribution case on the work-

(Testimony of Willard W. Lynch.)

room floor and entered the toilet room, the men's toilet room at the rear of the post office. We are still in this—I and the other postal inspector are still observing him. We observed his entry into the men's toilet room. We momentarily later heard the tearing of paper, and I would say within the minute from the time he left the workroom and entered this toilet room the two of us leave this look-out gallery and enter the toilet room, and immediately before us, as close as the two of us, was Mr. Formhals seated on a commode. [45] Do you want me to go on?

Q. Yes.

A. We call it a break-out door, it is more than a door, connecting the observation gallery and the toilet room, which permits immediate access into the toilet room, at which point when you step into that door we are as close as the two of us. Mr. Formhals was directly in front of us on this toilet seat, the very rear corner one, and he was immediately approached and asked regarding his operation. It was pointed out that directly under him was this torn letter and——

Mr. Hupp: May it please the Court, I think the witness is again summarizing what Mr. Formhals said. We object to the conclusion as such.

The Court: Overruled. He is describing what he saw.

Mr. Hupp: I am sorry. Then I misunderstood the witness.

(Testimony of Willard W. Lynch.)

Q. (By Mr. Osborne): You said under him. Would you explain that?

A. Yes. This is all within seconds from the time we entered this toilet room, Mr. Formhals is seated on this commode, and we were aware and we could see the currency notes protruding from his left shirt pocket, and directly under him—— [46]

Q. Excuse me. Were those the currency notes which you previously examined as part of Exhibit 2?

A. The exhibit consisting of the currency notes. And directly under him was the torn letter in pieces, which he was—this is all within moments—he was requested by us to recover himself.

Q. Did he recover them?

A. He did recover piece for piece.

Q. Are those the pieces which——

A. Those are the pieces.

Q. That is in Government's Exhibit 2-F?

A. Yes. Those are the same pieces representing the letter in which the same two currency notes in his pocket had been included at the time we had mailed it, I had mailed it, one hour earlier, at 3:30 out on the street.

Q. Was that one of the two test letters that you deposited?

A. Yes, sir. Also at the same time were these five other letters, four of which are not tests but are bona fide letters mailed by patrons of the Hemet office, at least four other letters and one other test, were on his bare leg between his trousers

(Testimony of Willard W. Lynch.)

and his bare leg on the left leg as he was seated on this commode.

Q. What did you state to Mr. Formhals at this time?

A. He was immediately asked, before he would have [47] the opportunity—before there would be any opportunity of disposing of these torn particles in the commode, to recover them. Which he immediately did. He co-operated and he recovered them. He was also asked to recover the two \$1.00 currency notes from his left pocket, which he did. We did not go onto his person at any time, and we didn't go into the commode. He did those two acts himself at our request.

Q. What happened then?

A. It is all within a minute or so there. He was asked to hand us the five letters from his bare left leg and to get up and put his pants up and accompany us to the postmaster's office. I would say one to two minutes at the most transpired in this toilet room.

Q. Did you then proceed to the office of the postmaster?

A. To the postmaster's office, to the front of the building. We even asked him—I remember specifically asking him, to save him any embarrassment, if he would like to accompany us on the exterior of the building around through the lobby.

Q. Was this done?

A. However, it was decided—we just went on through the work room into the postmaster's office.

(Testimony of Willard W. Lynch.)

Q. What happened when you arrived at the postmaster's [48] office?

A. The postmaster was immediately apprised of the facts.

Q. That is Mr. Wilson?

A. And Mr. Formhals was asked to be seated, and the mail was shown to him and he was asked to place his name and date as identification of the letters which were recovered from his person and the toilet commode.

Q. Did the defendant do this at this time?

A. He did it immediately.

Q. What happened after that?

A. This was about 4:30, 4:32 in the postmaster's office. By 5:50 or an hour and 20 minutes, the defendant had been completely interrogated, asked as to his offenses, his prior offenses, and all this information was incorporated in a statement which was completed at 5:50.

Q. How did you go about obtaining information from the defendant?

A. I typed this statement.

Q. First, let me ask, did you make any promises to the defendant?

A. No promises, threats, or inducements. He was also apprised of his constitutional rights in every other respect, however, the fact that any other information could be used against him in a court or otherwise. [49]

Q. How did you proceed about obtaining this information from him? By question and answer?

A. Yes. As the various statements are placed in

(Testimony of Willard W. Lynch.)

writing within this typewriter, he would be asked sentence for sentence, before it would be placed in writing. The statement was gradually built, you might say, sentence for sentence, paragraph for paragraph, each sentence being placed after he confirmed the statement.

Q. What did the defendant say at that time in regards to the reason that he had the letters with him in the commode?

A. He admitted the theft of those six letters and the rifling of the one letter. He also said——

Mr. Hupp: I will object to that as a conclusion.

The Court: Sustained. Tell us what he said.

The Witness: "I took the six letters, and I have opened the one, and I also threw the particles into the toilet commode." He said those things.

Q. (By Mr. Osborne): Did he tell you why he had done this?

A. He admitted these acts.

Mr. Hupp: Again I will object.

The Court: That may go out as a conclusion.

Mr. Osborne: Very well, your Honor.

The Court: You tell us what he said, and the [50] jury will determine whether he admitted these acts.

The Witness: All right, sir.

Q. (By Mr. Osborne): What did he say with regards to why he had done this?

A. He stated that he had taken these letters from the time—that afternoon, from the time he had started work on the outgoing distribution case at 2:45 until 4:30, a matter of an hour and 45

(Testimony of Willard W. Lynch.)

minutes. He also said that he took those particular letters because they were going to different charitable organizations in this country, for which he thought—and this is true on his part—for which he thought there is no real follow-up, that these charity houses don't know from whom they are receiving the contributions. And he made that statement that that was the reason for his selection of this type mail, this type of letter.

Q. Did he explain why he had torn up the one letter?

A. Yes. He said he had just—that was the first one, and he intended to tear up each one in turn while still seated on that commode, on the one act.

Q. You are now referring to the six letters?

A. That is right. However, we entered at the time and it was a 1 to 5 ratio. If we had waited longer, this is an assumption——

Mr. Hupp: I will object to the conclusion. [51]

The Court: You have answered the question.

Q. (By Mr. Osborne): Did he explain how he had the two \$1.00 bills in his pocket, did he explain to you how he had those in his pocket?

A. Yes. He stated he had just removed the two \$1.00 bills from this letter, and he had just destroyed or torn up the envelopes in which it had been contained. Which act we heard.

Q. Did the defendant make any statements to you regarding any prior activities regarding depositions of mail?

A. Yes. He said that he had been committing

(Testimony of Willard W. Lynch.)

depredations on the mails while working at this out-going distribution case, only that type mail, no incoming mail for delivery in Hemet, while working on this outgoing distribution case, for approximately six months prior to that date, June 25th, from which he had derived about \$50, not counting the acts of that day. He also said that—I have already said that he told us the reason for his selection of charitable letters. He said that in some instances he had opened letters which contained money orders or checks, and which he had resealed, inasmuch as there wasn't any currency to be derived, and he wished the addressees to receive the checks or money orders.

Q. You say you were typing these statements as they [52] were made. I show you Government's Exhibit for identification No. 1 and ask you if you recognize this document.

A. Yes, sir, I typed this. This is my signature.

Q. Is that the document you referred to earlier in your testimony?

A. This is the affidavit, yes, sir.

Q. How do you so recognize it?

A. I recognize it, it is on the United States Post Office letter form which was taken from the postmaster's desk at Hemet; it bears my initials and date on the first page; it bears my name on the second page, and it shows the time that it was executed as 5:50 p.m.

Q. Is there any handwriting of the defendant on that?

(Testimony of Willard W. Lynch.)

A. Yes. There is the handwriting of Donald W. Formhals, 5:50 p.m., June 25, 1958, on page 1, at the bottom; Donald W. Formhals' signature on page 2; and also in his handwriting, this—"I have read my statement of two pages and I say that everything herein is the truth." In addition there is the signature of C. W. Dow, a postal inspector. And on the front, page 1, "C.W.D. 6/25/58."

Q. Was this writing placed on that paper in your presence?

A. Yes, sir, as of 5:50 p.m.

Q. Does this typewritten report contain matter to [53] the same effect as you just testified?

A. Sir?

Q. Does that statement contain information to the same effect as you have just testified?

A. Yes, sir.

Mr. Osborne: I would like to offer Government's Exhibit for identification No. 1 into evidence at this time.

The Court: It will be received.

(The exhibit referred to was received in evidence and marked as Government's Exhibit No. 1.)

Q. (By Mr. Osborne): Mr. Lynch, I show you Government's Exhibits 3-A and 3-B for identification, and ask you whether you recognize these documents? A. Yes, sir.

Q. Will you tell us what the documents are?

(Testimony of Willard W. Lynch.)

A. These two, 3-A and 3-B, are descriptions of the two representative test letters showing a description of the exterior of the letters and a description of the monetary content of the letters.

Q. How do you recognize those?

A. It bears my signature.

Q. Your signature appears on both of them?

A. Yes, sir.

Mr. Osborne: Your Honor, I would like at this [54] time to offer Government's Exhibits 3-A and -B into evidence.

The Court: They will be received.

(The exhibits referred to were received in evidence as Government's Exhibits 3-A and 3-B.)

Q. (By Mr. Osborne): During the time you had Mr. Formhals under observation, did you notice anything unusual about his physical condition?

A. Nothing whatsoever. He was under observation from 3:40 to 4:30, 50 minutes, and thereafter later of course incident to the approach.

Q. In other words, your statement is you had him under observation almost continuously from 3:30 until what time?

A. From 3:40 until 4:30 from the look-out gallery, and from 4:30 until 5:50 thereafter.

Q. And during the time that you were questioning the defendant did he appear unduly nervous?

A. I observed no undue emotion of any kind.

Mr. Osborne: I have no other questions of this witness.

Mr. Hupp: No questions. [55]

* * *

DR. GLEN HALVERSON

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: Glen R. Halverson.

The Clerk: H-a-l-v-e-r-s-o-n?

The Witness: Yes.

Direct Examination

By Mr. Hupp:

Q. Dr. Halverson, what is your profession?

A. I am a physician and surgeon.

Q. Are you a medical doctor? A. Yes.

Q. Will you describe briefly your training, please?

A. I graduated for medicine from the College of Medical Evangelists in 1934, and after serving a year of residency, have engaged in the general practice of medicine and surgery. [58]

Q. Where are you presently practicing?

A. I am presently practicing and have been for some 21 years in San Jacinto.

Q. Is that near Hemet, California?

(Testimony of Dr. Glen Halverson.)

A. That's right.

Q. Dr. Halverson, in your practice of medicine, have you had occasion to treat the defendant Donald Formhals?

A. I saw him first in January of 1955.

Q. Have you treated him off and on ever since?

A. On several occasions.

Q. Doctor, did you have occasion to treat Mr. Formhals for a condition known as a duodenal ulcer?

A. Yes.

Q. Will you state when you first treated Mr. Formhals for that condition?

A. In January, 1955, I first saw him for that condition. I recommended adequate examination to establish the diagnosis, and this was done in the Veterans Hospital shortly thereafter.

Q. Was the diagnosis confirmed?

A. Yes.

Q. Has Mr. Formhals been suffering from a duodenal ulcer ever since?

A. I believe he has, yes.

Q. Do you know whether he was treated at the Veterans [59] Hospital starting September of this last year and through December for the same condition?

A. I understand that is the case.

Q. Doctor, will you explain to the jury—

Mr. Osborne: May I object to that last question, your Honor? Not that I contest the validity of it; however I would prefer the witness to testify to matters with which he is familiar, rather than unsupported hearsay.

The Witness: The only thing I can say about

(Testimony of Dr. Glen Halverson.)

that is that the patient when I saw him in November, that he had been in the Veterans Hospital from September to the early part of October.

The Court: Did he answer that satisfactorily? I didn't hear what you said.

Mr. Osborne: I was just objecting on the grounds that it is hearsay; not that I contest the validity. I offered to stipulate to the condition and the hospitalization of the defendant.

Mr. Hupp: Which is a stipulation that I will accept here in due course when we can present it in a little more detail.

Q. (By Mr. Hupp): Very well, Doctor. During the course of a duodenal ulcer, is it common for a patient to have heavy bleeding through the intestinal tract? A. Relatively so, yes. [60]

Q. Is it also common for this condition to cause a diarrhea condition?

A. Diarrhea frequently accompanies such.

Q. Do you know whether Mr. Formhals had suffered attacks of this nature, diarrhea accompanied by heavy bleeding from the intestinal tract, during the course of your treatment of him for this ulcer?

A. Such had been the case. He came in on several occasions, indicating that he had had black stools, which is the result of bleeding in the intestinal tract.

Q. Are these sometimes called tarry stools?

A. That is correct.

Q. What do these stools look like?

(Testimony of Dr. Glen Halverson.)

A. They are black, sticky.

Q. What causes them to be that color?

A. The change which occurs in the intestines due to the blood which has been released into the intestines from, in this case the ulcer.

Q. In other words, there is large quantities of blood mixed in with the stool, which causes it to be that color?

A. That is right.

Q. Doctor, Mr. Formhals, you say, had this symptom, had this problem. Can you tell me when you observed it first? When did you first treat him for it? [61]

A. First in January, 1955; he had a recurrent attack in May of that same year, and another attack in September, which carried on into October, 1955.

Q. Do these attacks come and go at different intervals, staying sometimes for a period of a week or two, and other times coming and going rather rapidly?

A. Yes.

Q. Doctor, what is the effect or what can be the effect on the person's mental state, assuming that there is prolonged diarrhea and heavy bleeding, heavy, tarry stools through the intestine?

Mr. Osborne: Your Honor, I am going to object to the form of the question.

The Court: Wait until he finishes the question. Had you finished?

Mr. Hupp: I think I had.

Mr. Osborne: I object to the form of the ques-

(Testimony of Dr. Glen Halverson.)

tion. It is leading the witness and it doesn't seem to be in the form of a hypothetical question. I am not sure that I understand exactly what type of question it is.

The Court: The objection is sustained. It is speculative. He asked what can be.

Mr. Hupp: Very well. Let me put it this way, if I might.

Q. Doctor, assume that Mr. Formhals had heavy bleeding [62] through the intestinal tract, and this was prolonged over a week or two, and along with this he had recurrent attacks of diarrhea maybe, three, four, five times a day, that he had to go to the toilet, could this condition affect his mental state? A. Yes.

Q. What effect would it have?

A. When there is considerable loss of body fluids, electrolytes and blood, an individual may become—the end result of that is coma.

Q. Is that sometimes called unconsciousness?

A. That's right.

Q. Can there be intermediate stages?

A. There may be intermediate states at all levels until the state of coma may be reached.

Q. Suppose we had a person who was not unconscious, but who had been suffering these attacks, what would be their mental state?

A. They might act reasonably normal, but at a later date be unable to recall or remember any actions that they did, or any events that transpired during this time.

(Testimony of Dr. Glen Halverson.)

Q. Is it possible that they could act somewhat—be acting somewhat in a daze without really knowing what they are doing? A. Yes. [63]

Q. Dr. Halverson, do you recall any occasions on which you saw Mr. Formhals in which he appeared to you to be in a daze?

A. This occasion in October of 1955, when he had a rather prolonged spell, he appeared to act just a little bit as if he were in a daze at that time.

Q. What were his actions that you recall that led you to that conclusion?

A. This is purely a memory—relying on memory at this time, there is no record of it in my records, written records, but I do recall that at that time he seemed to be a little confused and did not comprehend what was going on.

Mr. Hupp: Thank you, Doctor. You may cross-examine, Mr. Osborne.

Mr. Osborne: Your Honor, may I ask for a brief recess? Some of these terms are unfamiliar and I would like the opportunity to talk to Dr. McNiel a moment, if I could.

The Court: All right. We will take the afternoon recess.

During the recess period keep in mind the admonition heretofore given. Do not discuss the case. We will recess for about 10 minutes.

(Recess taken.)

The Court: May it be stipulated that all the members of the jury are present?

(Testimony of Dr. Glen Halverson.)

Mr. Hupp: So stipulated, your Honor. [64]

Mr. Osborne: So stipulated, your Honor.

Cross-Examination

By Mr. Osborne:

Q. Dr. Halverson, first let me make sure that I have your hypothetical situation correct. Is it correct that you stated that a man in Mr. Formhal's condition, with this ulcer condition, could through loss of blood be in such a condition between consciousness and unconsciousness so as not to remember his acts?

A. There would be one thing to add there before I answer, and that is loss of blood and water and electrolytes. That so upsets the body economy that individuals seem to be reasonably normal, but actually they do not recall what goes on. There is that state between consciousness and unconsciousness, yes.

Q. Assuming that state of facts, is it correct to say that you characterize this as somewhere between the state of total consciousness and the state of total unconsciousness? A. Yes.

Q. Am I correct in assuming that you are not characterizing this as amnesia, you are characterizing this, rather, as a loss of memory?

A. This is the result of a physical condition and [65] not the result of a mental condition.

Q. Doctor, I would like to ask you to draw a distinction between the situation of loss of memory

(Testimony of Dr. Glen Halverson.)

and a situation which is characterized as amnesia.

A. I am not a psychiatrist, nor a neurologist, but as I understand it, amnesia is a condition that is purely a mental condition, and the person may be perfectly normal physically. The condition I am speaking about is the abnormal mental functions in the presence of a depleted condition with reference to blood and water and electrolytes, which are lost in the process of bleeding and diarrhea.

Q. Is it true that you are saying this results in a loss of memory? A. Yes.

Q. A person, however, subject to this condition is conscious of what he is doing at the time, is that not true? A. I would think so, yes.

Q. In other words, when he does an act, he knows what that act is, although—let me rephrase that question. He does know what he is doing, is that true?

A. I think there may be some question about that. That he may realize, and he may not realize.

Q. Will you explain that, please? [66]

A. We see individuals in the hospital who have suffered a situation of this kind and they have acted as if they were reasonably normal, and after they have been given adequate treatment they fail to remember anything they did during—it may be several days—during the time that the body economy was so disturbed, that they do not remember anything that they did, or the time that has elapsed.

Q. Now, in your own words, would you draw a distinction between a loss of memory and the situa-

(Testimony of Dr. Glen Halverson.)

tion where you don't know what you are doing, or is there a distinction?

A. I don't believe I would be able to answer that very well. I think that borders on the psychiatric angles and I wouldn't attempt an answer.

Q. Let me ask you this question: If a man is subject to this condition you are talking about, where he has had a loss of body fluids, is it not true that his physical capabilities are also somewhat impaired?

A. In some instances they don't seem to be. The end result——

Q. Is it not normal that his physical abilities would be impaired?

A. The end result is unconsciousness and complete impairment of physical abilities, yes. But—— [67]

Q. As a general rule, isn't this true, that as a person would reach a state serious enough to impair his mental facilities, that also his physical capabilities would be somewhat impaired?

A. In those that I have seen, they seem to act perfectly normal both in their mental and physical activities, and then when the fluids and electrolytes are corrected, then they are cognizant of things as they are actually, and have complete loss—have no memory at all for what has occurred in the preceding time.

Q. Is it true that you are stating that the man, although he may have future loss of memory, that he is in all probability thinking clearly and acting

(Testimony of Dr. Glen Halverson.)

normally? That seems to be what you are saying. Is that true?

A. I doubt if he is thinking clearly. He may be acting apparently normally.

Q. What would you describe as the condition of his thinking during a state such as we are discussing?

A. Frankly, I don't know what to think about that. All I know is that patients in that condition do not recognize what is going on about them, and they do not have recollections of seemingly normal activity that they engaged in during the time.

Q. Would it be possible in this condition for a person to engage in acts requiring a certain amount of complicated [68] thinking?

A. I don't know.

Q. Doctor, wouldn't it also be true that if a person had lost the amount of blood required to bring on this condition, that there would be some manifestations possibly in that the loss of blood would cause him to be somewhat pale and there would be other characteristics such as perspiration, excess perspiration, some outward manifestations of his condition?

A. No. Of course, you would have to qualify that by saying a loss of blood and electrolytes, because it is the electrolytes loss, the fluids and salts, that are the factor which primarily causes the mental disturbance.

Q. That is the situation that I am discussing.

(Testimony of Dr. Glen Halverson.)

You will have to forgive my lack of familiarity with the terms.

A. It would be both factors.

Q. Now, if both those factors were present, isn't it true that the person suffering this affliction would exhibit certain characteristics, such as paleness, excessive perspiration, and other outward manifestations?

A. When the severity of the situation is sufficient, that will be true. But I think the disturbance of the mental faculties may occur before the appearance of these signs of shock would come, sweating and paleness and [69] so forth.

Q. When a person has reached this particular degree of this situation, in the usual situation would it be possible that he could return again to normalcy, or would he ordinarily progress on into a more severe form of shock?

A. Depending on the continuance of symptoms, as to whether or not he would get better or worse.

Q. Did you examine the defendant on or about June 25, 1958? A. No.

Q. Did you examine the defendant at any time within two or three weeks before or after that date?

A. No.

Mr. Osborne: I have no further questions.

(Testimony of Dr. Glen Halverson.)

Redirect Examination

By Mr. Hupp:

Q. Just one or two very brief questions, Dr. Halverson.

You have described this condition as occurring with a loss of body fluids, electrolytes, and blood. What physically happens to the brain?

A. The functions of the brain become impaired when there is deficiency of salt and water. As a short illustration, in very small infants who have a severe attack of [70] diarrhea, they become unconscious in a matter of hours. In an adult the situation takes a longer time, and depending on how severe the symptoms may be.

Q. Does this condition result in a lack of supply of oxygen to the brain?

A. I am not aware of the answer to that question with reference to electrolytes and the functioning of the brain, and the lack of electrolytes and fluids.

Q. As a rough illustration, Doctor, when a person is suffering from this condition, is he roughly like an aged person suffering from arteriosclerosis with regard to his memory and the connection between his physical and mental acts?

Mr. Osborne: Your Honor, I object to that question as being completely conjectural.

The Court: Overruled.

The Witness: Only that the actions of the in-

(Testimony of Dr. Glen Halverson.)

dividual who is suffering with arteriosclerosis, and his brain does not function for that reason, only on his surface activities he would appear all right; and that would be the only way that there would be any comparable condition is that the individual suffering with a deficiency of electrolytes and fluids might appear to act normal, but actually they are not.

Mr. Hupp: Thank you, Doctor. That is all I [71] have.

* * *

DR. EDWIN E. McNIEL

called as a witness in rebuttal by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: Dr. Edwin E. McNiel.

Direct Examination

By Mr. Osborne:

Q. Dr. McNiel, what is your occupation?

A. Physician and surgeon, M.D.

Q. Do you have a specialty?

A. Yes, I do.

Q. What is that?

A. Neurology and psychiatry.

Q. Will you state briefly what your training and experience [72] has been?

(Testimony of Dr. Edwin E. McNiel.)

A. I graduated from the University of Colorado School of Medicine in Denver in 1931. Following that I served a rotating internship in the Alameda County Hospitals in Oakland and San Leandro. After that I was a Commonwealth Fund Fellow in Psychiatry at the University of Colorado Medical School for two years. After that I was a resident psychiatrist at what was then called Bloomingdale Hospital in White Plains, New York, for two years. After that I was clinic executive at the Paine-Whitney Psychiatric Clinic which is associated with the New York Hospital, Cornell Medical School, New York City, for a little over two years. After that I was Director of the Hawaii Mental Health Clinic in Honolulu for nine months, and then I was Director of the Bureau of Mental Hygiene for the Territory of Hawaii for a little over four years. The last 15 years I have been in private practice in neurology and psychiatry here in Los Angeles. I am certified by the American Board of Psychiatry and Neurology—

Mr. Hupp: Doctor, excuse me for interrupting.

If it will save time, we will stipulate to the doctor's qualifications.

Q. (By Mr. Osborne): Would you complete your answer, please?

A. I have been on the panel of the Superior Courts—psychiatric [73] panel of the Superior Courts of Los Angeles for approximately 15 years, and on the panel of the Federal Courts in Los Angeles for approximately 15 years. Psychiatric consultant to the juvenile courts in Los Angeles for

(Testimony of Dr. Edwin E. McNiel.)

about the same length of time. I am a member of the Los Angeles Society of Neurology and Psychiatry, the Southern California District Branch of the American Psychiatric Association. I am a Fellow of the American Psychiatric Association, a member of the American Orthopsychiatric Association, a member of the American Psychopathic Association, and several others. I think that is probably enough.

Q. Doctor, are you familiar with the defendant in this action?

A. I examined him on one occasion.

Q. Was that as a result of being appointed by this Court to examine the defendant?

A. Yes, it was a Court appointment.

Q. Doctor, you have been present while Dr. Halverson was speaking; are you familiar with the medical aspects of the symptoms brought on by bleeding ulcers?

A. I believe so.

Q. If I may pose a hypothetical question in which I may attempt to approximate that which was posed to Dr. Halverson. That is, assume a situation where a person has this condition of bleeding ulcers, accompanied by so-called [74] tarry stools, over a period of time, of course accompanied with a loss of blood and a loss of certain body fluids; now, in that situation would you describe what is generally the physical result of such condition?

A. Well, in my opinion this is entirely dependent upon the amount of blood that has been lost in a given period of time. There are of course millions of people in the country who have ulcers which

(Testimony of Dr. Edwin E. McNiel.)

occasionally bleed, and most of them are walking around and doing their normal work.

There are people, however, who may have a substantial loss of blood within a relatively short period of time, and there of course this naturally can proceed to the point where there is unconsciousness.

Q. Doctor, at this point I would like to ask you to distinguish between unconsciousness and amnesia, if you would.

A. Well, amnesia refers to a loss of memory for a particular event or series of events. Amnesia may be of three types. It can be a claimed loss, which may be malingering, or in other words the individual says he does not remember when in fact he does; it may be an organic amnesia which is based on some change in the structure or function of the brain; or it may be an hysterical amnesia, in which the individual honestly claims [75] that he doesn't remember, but actually later on he may remember, or he may remember on the use of medication or something of that sort. But it is honest.

Q. Will you distinguish this situation and the situation described as lack of consciousness?

A. Well, I assume that you are referring to the state of consciousness at the time of the commission of the alleged act, is that it?

Q. We are still dealing in terms of a hypothetical, the hypothetical situation being that this loss of blood has occurred——

The Court: Mr. Osborne, I want to interrupt you once more for your own benefit. If you could

(Testimony of Dr. Edwin E. McNiel.)

watch these jurors—you have just the reverse of what we have in the ordinary case. In the ordinary case the attorney speaks out and it is easy for the jurors, and then they have difficulty hearing witnesses. Here these jurors, when you ask a question, they are up like this (indicating), and then they relax, because they can hear clearly the witness testify. If you will just watch the jurors. The witness himself speaks so clearly and they can understand him and they are relaxed. When you are asking a question they are out like this (indicating) trying to catch you, and then I suppose they catch about half of it. [76]

Mr. Osborne: I am sorry. I have a little sore throat, and if I speak too loudly I will end up coughing.

The Court: Speak from your diaphragm. If you can't feel it down here (indicating), and I often tell witnesses that, if you can't feel it down here, you are not speaking loud enough.

Mr. Osborne: Very well.

Q. Doctor, is there a distinction between amnesia and loss of consciousness?

A. Well, in my opinion there is.

Q. What is that distinction?

A. By consciousness in this situation we are referring to the state of mind of the individual at the time of the alleged act; and when we speak of amnesia we are speaking of some state of the individual saying that he does not remember what happened at that time. The fact that he says he does

(Testimony of Dr. Edwin E. McNiel.)

not remember doesn't mean that he wasn't conscious at the time. He may have a complete loss of memory for what happened, but that does not mean that he was unconscious or unaware of the nature of what he was doing at the time of the act.

Q. In your opinion, Dctor, is it possible that a person who is somewhere in this range of loss of consciousness due to loss of blood could commit acts without knowing what he was doing, and this would be as opposed to [77] could commit acts and then suffer a loss of memory? This is the situation that I am trying to distinguish.

A. Well, in my opinion the commission of acts in a state of unconsciousness is an extremely rare situation. There are only a very, very few conditions that in my opinion are responsible for such a situation.

Q. Could you explain what that type of condition would be?

A. There are certain types of epilepsy where this may be true; there are certain types of brain tumor where it may be true; in an extremely acute state of alcoholism it may be true.

Q. These are acts committed without knowing——

A. The patient being conscious and aware of the nature of the acts which he is committing.

Q. Doctor, in this condition due to a loss of blood, is it more likely that the person would have a loss of memory than the loss of reasoning ability?

(Testimony of Dr. Edwin E. McNiel.)

A. Probably.

If I may, your Honor, I think the doctor stated in his cases in the hospital that afterwards when they were treated that they did clear up——

Mr. Hupp: Excuse me, Doctor.

I will object to argument regarding the effect of Dr. Halverson's testimony. I have no objection to Dr. [78] McNiel expressing his own opinion here.

The Court: The objection is overruled. He may explain his answer. He is explaining his answer.

Mr. Osborne: Would you continue, Doctor?

The Witness: Well, I was simply trying to state that the doctor in recounting his own experiences in the hospital, that he had cases where they had this condition and after they treated them that later on they did recover some of their memory for the event.

I believe that is what he said.

Q. (By Mr. Osborne): Doctor, you did state that you have examined this particular defendant, is that true? A. Yes, sir.

Q. And did this defendant relate to you his medical history? A. Yes, sir.

Q. Did you have an opportunity to examine him at length?

Excuse me.

Did you have an opportunity to examine him at length concerning his mental condition at the time of the commission of this offense?

A. Yes, I did.

Q. In your opinion what was his mental condi-

(Testimony of Dr. Edwin E. McNiel.)

tion at the time of the offense? In your opinion, Doctor, [79] what was his mental condition at the time of this offense?

A. In my opinion he was sane and without psychosis and in control of his mental faculties.

Q. Is it possible that he might also have suffered a loss of memory as to what happened at this specific instance, without altering your opinion?

A. Surely.

Q. And this would in no way be inconsistent with your conclusion in the matter?

A. No, sir.

Mr. Osborne: I have no further questions.

Cross-Examination

By Mr. Hupp:

Q. Dr. McNiel, as I understand it, your specialty is psychiatry, you are primarily a psychiatrist; is that correct?

A. Neurology and psychiatry.

Q. As such you normally do not treat ulcer patients, is that also correct?

A. No. As a matter of fact, I see a good many ulcer patients.

Q. But what I am getting at is you normally are treating the mental, or you might say—yes, the mental aspects of what perhaps you might say causes the ulcer, or [80] what results from it, rather than the ulcer itself?

A. It may or may not be that situation, depending on the individual case.

(Testimony of Dr. Edwin E. McNiel.)

Q. Doctor, you said that, as I understand it, the acts of which the patient is not conscious are very rare, and you gave as an example some types of tumor, epilepsy, and alcoholism. In this type of situation does the patient do acts which his mind doesn't command him to do?

A. I am sorry, I don't get your question.

Q. Perhaps I don't get it, either. Maybe what I should say—let me use this example. Take a person who is sleepwalking, obviously he is doing volitional acts, his muscles are moving his acts, but in that situation does the patient know what he is doing?

A. He is in my opinion in a changed state of consciousness.

Q. Would you say that this was a wilful act, sleepwalking?

A. Well, in my opinion it is subject to the desires of the individual.

Q. In other words, in the sense that you use the term consciousness, the physical motions, the moving of the muscles which cause the legs, say, to move forward, or the hand to go in the pocket, all this is a conscious act by the patient as you use the term, is that correct? [81]

A. This is a difficult thing and I want to try to be correct about it.

There is a variation in the state of consciousness, but I believe the accepted theory is that the majority of people would not commit an act in a state of sleepwalking that would be against their ordinary

(Testimony of Dr. Edwin E. McNiel.)

principles. And very often they are able to remember part of it.

Q. That wasn't the question. I don't mean to cut you off, but I wonder if you would direct yourself to the question I asked.

Would you read the question, Mr. Reporter, please?

(The question referred to was read by the reporter, as follows:

“(Q. In other words, in the sense that you use the term consciousness, the physical motions, the moving of the muscles which cause the legs, say, to move forward, or the hand to go in the pocket, all this is a conscious act by the patient as you use the term, is that correct?”)

The Witness: Well, I'm sorry, counsel, I feel I did answer the question. It is in a stage of consciousness. It may not be fully-aware consciousness.

Q. (By Mr. Hupp): Then there are degrees of consciousness running all the way from complete inertness to [82] what you might call fully-aware consciousness? A. Naturally.

Q. In other words, it is not a question of the man is either conscious or unconscious, but there are degrees ranging the full spectrum?

A. We are still in sleepwalking?

Q. If you want to be still there, if that will help illustrate the answer, yes. A. All right.

Q. Maybe we are not clear as to whether I just asked a question or not. Let's skip the sleepwalking

(Testimony of Dr. Edwin E. McNiel.)

for a minute. There are degrees of consciousness ranging all the way from, say, when a man is sleeping or has been conked on the head, to where he is running around playing baseball and fully aware of his every act; is that correct? A. Yes, sir.

Q. And that somebody could be anywhere from one end of the spectrum to the other and still be what you would call fully-aware consciousness or a changed state of consciousness?

A. Depending upon the various factors that are involved in the particular situation, yes, sir.

Q. Right. Now, what effect would a lack of supply of oxygen to the blood stream have on the brain? Is this commonly called anemia? [83]

A. In my opinion it is a secondary effect.

Q. What is anemia?

A. Anemia has to do with having a low content of hemoglobin in the bloodstream. This may mean a low number of red blood cells or it may mean a small—the normal percentage of hemoglobin in the blood cells.

Q. In some situations is there a lessening of the supply of oxygen to the brain?

A. In some situations?

Q. Yes. A. Yes.

Q. Does this cause a similar effect on the brain that would come about, say, to an aged person with an arteriosclerosis and a narrowing of the blood vessels in the brain? In other words, what I am getting at is a lessening of the supply of blood to the brain.

(Testimony of Dr. Edwin E. McNiel.)

A. Well, in the person with an arteriosclerosis, and aging, there is a diminution in the whole circulatory process in the brain, and of course that does result in the individual cells in the brain having a lowered supply of oxygen and other nutrients.

Q. Doctor, you have undoubtedly had patients, have you not, who have this problem of arteriosclerosis and have a lessening of the effect of blood on the brain? You have had patients with arteriosclerosis? [84]

A. Yes.

Q. It is a common thing in aged people, I take it. Isn't it common for such people to be in what you might call a daze, not be fully aware of what they are doing from time to time?

A. They may or may not be, depending upon their condition.

Q. Suppose they are, what is the effect, what happens to their brain?

A. Suppose they are what?

Q. In what you said, sometimes they are in a dazed condition and sometimes they aren't. All right. Now I am taking the half that are.

A. I want to make this clear, counsel; that every person who has arteriosclerosis is not in a dazed condition.

Q. I understand that.

A. It varies depending on what the actual architectural and organic state of their brain is, and depending upon their circulation.

Q. This I understand, Doctor. Let's take the people who have a lessening of the supply of blood

(Testimony of Dr. Edwin E. McNiel.)

to the brain and you say sometimes they are in a dazed condition. What happens to their brain in this situation?

A. Well, it isn't supplied with the normal amount of [85] oxygen, and the waste products are not carried away, and they don't secure the normal nutrient factors for the brain tissue, and there may be a diminution in the function of the brain cells.

The Court: Counsel, this is all very interesting, but may I ask, is it your contention that the defendant had arteriosclerosis?

Mr. Hupp: No. I am using this more as an example to make it clear to the court and the jury what can happen in a diminution of the supply of blood and oxygen to the brain.

The Court: If you do not contend that he was so afflicted, of course it isn't going to be of any help to the jury.

Mr. Hupp: Very well. Let me pin it down this way, Doctor:

Q. Would the medical situation be similar in this instance, in this sense, that where you have a loss of a great deal of blood from a duodenal ulcer, and the patient has developed anemia, could it be that there is a lessening of the supply of blood to the brain?

A. Well, in my opinion, there would probably be the same amount of blood going to the brain.

Q. But would there be a lessening of the supply of oxygen to the brain? [86]

A. There could be.

Mr. Hupp: I have no further questions.

Mr. Osborne: I have no further questions, your Honor.

* * *

DONALD W. FORMHALS

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: Donald W. F-o-r-m-h-a-l-s, Formhals.

The Clerk: Thank you, sir.

Direct Examination

By Mr. Hupp:

Q. Mr. Formhals, you are the defendant in this case? A. Yes, sir.

Q. Were you on or about June 25th last year a postal employee employed at the Hemet post office?

A. Yes, sir, I was.

Q. On that date you were arrested by [87] Inspector Lynch and Inspector Dow and charged with stealing from the mails? A. Yes, sir.

Q. Mr. Formhals, at and a number of years prior to that time what has been your physical condition?

A. Well, in and out of the hospitals about 90 per cent of the time.

Q. Are you suffering from a duodenal ulcer?

(Testimony of Donald W. Formhals.)

A. Yes. And the duodenal ulcer is the main source of my troubles.

Q. Mr. Formhals, have you had at various times and with varying intensities severe diarrhea attacks? A. Yes, sir.

Q. For how long do these attacks last from time to time?

A. Different times I have had them they have varied in length. Sometimes for hours, sometimes I have gone for several days just one trip after another, just practically a constant run back and forth to the bathroom.

Q. On occasions have you also had heavy bleeding through your stool? A. Yes.

Mr. Osborne: I will object to this, your Honor, and ask that the question and answer be stricken. It is leading the witness. [88]

The Court: The objection is not timely. They are leading questions, but the objection is overruled. It is not timely. He has already answered the question.

Mr. Osborne: Very well, your Honor.

The Court: Don't ask leading questions.

Object to the questions before he answers them.

Q. (By Mr. Hupp): Mr. Formhals, have you had occasion to examine your stool from time to time? A. Yes.

Q. What color is it?

A. It has been a dark, coffee ground, you might say, type of refuse.

Q. Have you had this condition at the same times or similar times when you have had diarrhea?

(Testimony of Donald W. Formhals.)

A. Yes. There have been times when there was small—three or four different times there has been small chunks of actual blood in with the mixture. That is what originally got me worried about it.

Q. Have you had medical treatment for this condition? A. Yes, sir.

Q. What medical treatment have you had for this ulcer condition and these symptoms that you have described to us?

A. Well, in and out of Service hospitals over a [89] period of six years. In military service it was in and out of the hospital at different times with different types of X-rays and treatments, medicines and pills, psychiatric—

Q. Since you have been out of the service, have you been under the care of a doctor off and on?

A. Yes, from the day I got out of the service, in fact, I have been under the care of doctors.

Q. Dr. Halverson has been one of these doctors?

A. Yes, sir.

Q. Have you had any other hospitalization?

A. Yes.

Q. When was that?

A. The 1st of September is the last hospitalization, if that is what you mean.

Q. How long did it last?

A. 13 November, and then I had another hemorrhage and turned right back into the hospital the evening of the 29th, I believe it was, or the 30th of November, two weeks after I got out, whenever it

(Testimony of Donald W. Formhals.)

was, and I got out Christmas Eve of '58, that was my last hospitalization.

Q. Which hospital was this?

A. Veterans Hospital in Long Beach.

Q. Did they treat you for an ulcer condition?

A. Yes, they did.

Q. Mr. Formhals, on these occasions when you have [90] had, as you have testified, attacks of diarrhea and bleeding, what effect did this have on your mental condition?

A. At different times different effects?

Q. Describe some of them for me, please.

A. Well, the main thing on the mental condition is just the fact that you make idiotic stunts, you might call them, that doesn't make much sense, after I have been told about them and stopped to realize what has happened and everything is brought back to me in a way that I understand it.

Q. Are there times when you don't have any memory of doing some of the things that you are later told you did? A. Yes.

The Court: Let him testify, counsel. I told you not to ask leading questions.

Mr. Hupp: I am sorry.

The Witness: That went back several years from that particular point there.

Q. (By Mr. Hupp): About June 25th, Mr. Formhals, would you describe your physical condition at and before that time?

A. Starting about the last of March or the first of April, I can't set an exact date, I don't know just

(Testimony of Donald W. Formhals.)

exactly what date, I started having these—well, just [91] as soon as I would get up in the morning I would start having these diarrhea spells, have dizziness when I would first get up in the morning, and started getting concerned over it, and I had been warned by the doctor——

Q. I stopped you because you were getting beyond the scope of the question.

You said you started having this diarrhea. How long had you had this? Had this been continuous to June 25th?

A. Yes. It had been irregular times much longer before that, but as I said, it started the last of March, first of April, and was continuous right up through there, where my weight started dropping tremendously and the stool was just picking up a quantity of blood in it all the time.

Q. What was the color of your stool during this occasion, during this period?

A. It was the black, coffee ground material that it had been before, with intermittent, I would say, chunks of blood.

Q. Very well. Now, let's come to the afternoon of June 25th. What were you doing at the Hemet post office? What were your duties?

A. Starting the first of the day now?

Q. Start after lunch on the 25th.

A. Well, when I came back from lunch at 12:30, I returned to my window. I was operating a stamp window in the register section, selling stamps and so on is what it consists of, and unlocked my drawer,

(Testimony of Donald W. Formhals.)

and another clerk was having his money counted for his quarterly check, and I opened my window as usual.

Q. Did you operate the window for a period of time?

A. Up until the postmaster assigned me to the specific duty of going back and dispatching mail, yes, I run the window from——

Q. Approximately when did that happen, when did the postmaster assign you that duty?

A. About 2:30, I would say; about two hours after I came back from lunch I would say.

Q. What did you do after the postmaster spoke to you?

A. Well, I raised the question, like I have in instances before, why I was the goat to have to go back and case the mail when there had been no help all the rest of the day before, in the morning.

Q. The question is, what did you do, not what you said?

A. Just like I said. I questioned him when he told me to go back to the rear of the post office and case the mail, I questioned him about it, wondering why I was the one that had to go back there, because there was already [93] plenty of help.

Q. After this conversation, did you go back to the rear of the post office? A. Yes, I did.

Q. What did you do there?

A. Commenced sorting mail, like I said, about 2:30. I had been there about 15 or 20 minutes, I guess, and I hadn't been feeling good all day the

(Testimony of Donald W. Formhals.)

way it was, and I had my glasses, was wearing my glasses, and after I had been there 15 or 20 minutes, I judge, I had one of my sick spells and I went into the rest room, and I made a remark to the superintendent of mails at the time that I wasn't feeling good and I didn't know whether I was going to be able to finish out the day or not. I had mentioned it to him several times before, that I might have to go and see the doctor and get some stuff to dry my stomach up and get me to feeling better. So I hung on another five or ten minutes and I had another spell like when they started. When they get started, they keep me going pretty regularly.

Q. As I understand it, you had already gone to the toilet once at this point?

A. I had gone twice.

Q. And now you are back sorting the mail again?

A. Yes, sir.

Q. Then what happened? [94]

A. Well, I guess around—timewise I don't know what time it was, only by previous testimony what time it must have been.

Q. Just tell us what you know of your own knowledge.

A. Timewise I don't know what time it was. I had another one of my spells and I leaned against the casing table. I got to feeling a little bit better and got straightened up to my likings and started casing the mail and I got sick again and headed for the bathroom, and had this handful of mail in my possession when I went in there, and that was it.

(Testimony of Donald W. Formhals.)

Q. Did you sit down on the toilet?

A. Yes, yes.

Q. What do you remember happened after then?

A. The door flew open, coming in from the outside, evidently from the closet or entrance from the outside, whichever it happens to be, and the two inspectors came in.

Q. Do you recall anything that happened before the inspectors came in?

A. No, sir, I don't.

Q. Okay. What happened then?

A. Well, when they came in, they were coming up to me, and it startled me, and, well, I got up off the stool and the mail that I had in my hand I—let's see, I put it over behind on a wash basin, that is where I was [95] moved around to the wash basin, I put the mail behind the handle on the wash basin.

Q. Do you recall picking any papers up?

A. Picking any papers up?

Q. Yes. A. No.

Q. Do you recall any conversation with the postal inspectors in the wash room?

A. Yes, after—I don't know how long, I don't have any idea how long we had been standing there, but after one of them mentioned the fact of—asked me what I was doing with the mail, and this and that, one of them made the remark, said, "Here it is," and produced the two \$1.00 bills.

Q. Do you have any recollection of handing these to the postal inspectors?

A. No, I don't have any recollection of handing

(Testimony of Donald W. Formhals.)

them to them. The first thing I know about any money is one of them remarking to the other, "Here is two of them," and they was shown to me at that time. That is what I was trying to get at.

Q. Then what happened?

A. One of them took the mail, and I was asked—I got pretty shook up at the time and I start crying, and I was all upset emotionally at the time trying to figure out what exactly was going on, where I could get a picture of [96] it, and one of them asked me if I wanted to save myself some embarrassment, if we could go around the outside of the post office, or wanted to go through there, and I said I don't want to go through the post office if I could get out of it.

Q. What happened then? Did you leave the men's room? A. Yes.

Q. Where did you proceed to?

A. We went out through the same door that they came in, around the outside of the post office and around the front, and I got on the outside and got some fresh air and got to feeling a little better, and got around into the front.

Q. Where did you go?

A. In the postmaster's office.

Q. Who was present?

A. The postmaster was in the office when we went in there.

Q. Who else was present in the office with you?

A. The two postal inspectors and myself was the ones that went in.

(Testimony of Donald W. Formhals.)

Q. Then will you describe what happened in the office of the postmaster?

A. Well, the first remark that I remember being made was one of the inspectors told the postmaster what [97] they had found and asked him if he wanted to stay in there while the questioning was going on. And he said, No, he had better leave.

And he went from there out the door into the—well, what we call the cage. It is in the register section. It is all caged in. He went in that part towards the back of the post office.

Q. Did the postal inspectors remain?

A. Yes.

Q. Very well. Did you have any conversation with them? A. Yes.

Q. What was that conversation?

A. I got emotionally upset again, and I don't remember an awful lot about what the conversation was. Started the same line about where I was born, age, how long I worked in the post office, and so on and so forth.

Q. Let's get into the so on and so forth. What did they say and what did you say, to the best of your recollection? Of course I know you can't remember the exact words, but give us the substance of what was said.

A. Well, during the—as the afternoon went on, the questioning was to the best of my knowledge conversation between the two inspectors. One of them would suggest something and the other one would go along with it, and that seemed to be the

(Testimony of Donald W. Formhals.)

extent of my guilt or not being [98] guilty, whatever they was trying me on right there.

Q. What I am getting at is not your feelings about it, but what was said. Tell me as best as you can recollect what was said?

A. It is hard to say what was said. I don't remember an awful lot about what the actual conversation was between the inspectors and myself. It started out asking me what the money was doing on me, and I denied it because I didn't know—to the best of my knowledge there wasn't any money on my person except what they had showed me and said that it was.

Q. Did you place your name on Exhibits 2-A to 2-F here? A. I did later on.

Q. And on the dollar bills?

A. Everything they put in front of me I signed my name to it.

Q. What did the postal inspectors say when they asked you to sign your name? A. To what?

Q. To these Exhibits 2-A to -F.

A. They told me to sign them.

Q. Did they tell you why they wanted them signed?

A. That them was the letters that I had had in my possession, yes. Them was the letters I had in my possession. [99]

Q. What did they say about why they wanted you to sign them?

A. There was no explanation as far as I know.

Q. Did you sign them at their request?

(Testimony of Donald W. Formhals.)

A. Yes. They said those were the letters they found on my person and for me to sign my name to them.

Q. Was one of the inspectors typing?

A. Yes.

Q. Were you talking to the other one or were you talking to both inspectors?

A. I would say both of them, whoever happened to be talking.

Q. Do you have any further recollection as to what was said between you and the inspectors?

A. The part about the six months, that I was supposed to have said about taking mail for six months in the amount of \$50, or something like that, that is all the words of one to the other of the inspectors. One of them made the remark about taking it for six months. And not to my knowledge I haven't taken any. And on a statement that I made later to another concern that was investigating it, to the best of my knowledge I have never opened any first-class mail whatsoever at the post office, or removed any of its contents, or so on. But it was agreed on. [100]

Q. Did you tell the inspectors that you had taken \$50 over the last six months?

A. I did not tell them in my own words that I had taken any amount of money.

Q. Can you remember any other conversation?

A. Nothing except—well, I don't know what time it was, it was just before I went home the inspectors

(Testimony of Donald W. Formhals.)

were, you might say, debating what my status was going to be for the evening, or something like that.

Q. What was your physical condition during this interrogation?

A. I was emotionally upset very much all afternoon, I was sick, I complained to them I was sick in the morning before I went back there and it perturbed me very much to be assigned to that job because I wasn't feeling well.

Q. My question was directed to the time of the interrogation, what was your physical state at that time?

A. I was just plain sick, that's all, and emotionally upset to where it didn't make any difference to me at the time as long as I could get out of there and go home. And I didn't care much what happened, period.

Q. You have seen Exhibit 1, I take it, which is the statement typed—as testified to by Inspector Lynch that he typed, have you seen that [101] before?

A. Yes, sir, I did.

Q. Is that your signature on the statement?

A. Yes, it is.

Q. On each page?

A. Yes. If it was on both pages, I guess it was.

Q. If there is any doubt, let's look at it.

Is that your signature on the first and second pages?

A. Yes, it is.

Q. Is that your handwriting on the second page where there is a handwritten sentence?

A. Yes, it is my handwriting.

(Testimony of Donald W. Formhals.)

Q. Now, would you read what you wrote in your handwriting?

A. "I have read my statement of two pages and I say that everything herein is the truth."

Q. You wrote that in your handwriting?

A. That is my handwriting.

Q. Did you read the statement over before you wrote that and signed your name?

A. I did not.

Q. What was——

A. I remember a discussion about it before I signed my name.

Q. What was the discussion? [102]

A. One of them instructed me to read it, and I told them if they let me out of there—that I wasn't interested in reading it, if I had to sign it, I would sign it, that I wanted to leave and go home. They asked me—one of them asked me, rather, if I would go home if I was released to go, and I said yes. And the two of them went out in the hallway and discussed it. I presume that is what it was about. They came back in and asked me what I intended on doing if they would let me go, and I made some gesture like so (indicating), and one of them says, "Well, that is what I thought," to that effect. One of them asked the other one if they thought it was okay to let me go, and he said he guessed so, and told me to go straight home.

Q. Finish your answer.

A. I told them if they needed anybody to vouch for me, that I would name anybody, if they would

(Testimony of Donald W. Formhals.)

just let me get out of there so I could collect my wits and get straightened up; that I could get anybody to vouch for me to make sure of my appearance back there. I was asked to come back that evening. That is what I was getting at.

Q. We are getting beyond the scope of the question now. A. Okay.

Q. Did you read this before you signed it?

A. Definitely not, I didn't read it. [103]

Q. What was your physical state by the time you signed this paper?

A. There wasn't much physical state left. Like I said, I didn't care much what happened as long as I would get out of there. I was just so upset, and I had been crying and acting up in there, and I was laying down with my head on the little table in the office there most of the time, and I just wasn't paying much attention to what was going on, I just wanted to get out of there, get outside. I didn't care where I went.

Q. Do you have any recollection at all of what happened between the time you entered the toilet room and the time the postal inspectors broke in?

A. No, I don't actually remember even going in the toilet room itself. I remember having the succession of diarrhea spells. I don't actually remember going into the toilet room itself.

Q. To your knowledge, did you ever have the intent to steal or embezzle any mail?

A. Negative.

Q. You mean——

(Testimony of Donald W. Formhals.)

A. No reason whatsoever.

Mr. Hupp: You may cross-examine.

The Court: Well, it is 4:00 o'clock. We will recess. [104]

* * *

Cross-Examination

By Mr. Osborne: [108]

* * *

Q. Directing your attention to the 25th of June last year, as you testified yesterday, you were able to recall the events up until approximately 4:30 is that correct?

A. Some time before then. I don't know just exactly what the time was.

Q. Up to approximately the time you entered the men's room?

A. Just a little while before then. It was when I had my last spell, yes, dizziness, and I sat down.

Q. Going back over what you testified, you remember in some detail what you were doing on that day, is that not correct? A. During the day?

Q. During the afternoon prior to the time you entered [110] the men's room? A. Yes, sir.

Q. Was it your testimony that you recall working at a window selling stamps for a while?

A. During the morning, sir.

Q. And then being sent back to sort mail?

A. Yes, sir.

Q. In the afternoon.

(Testimony of Donald W. Formhals.)

These letters that you were sorting, would you describe the source of these letters, how had these letters arrived on the desk in front of you?

A. Either by myself or someone else running them through the cancelling machine and placing them on the table in front of me.

Q. Can you describe for us the procedure that you followed in that post office picking up mail, bringing it in the post office and running it through?

Let me be more specific.

I refer specifically to the mail drops in the post office building, would you describe how those are processed?

A. When the letters are dropped in the box and when I go to get them, is that what you mean?

Q. Yes.

A. Okay. The letters are dropped from the outside, [111] there is a large entrance inside the post office, depending upon the amount that is in the drop, picking them up in your hands or a table, whatever will hold the amount that was there, taking the amount back to another table, putting all the stamps and everything in the same direction, same size letters in the same size piles, and inserting them into the cancelling machine as it took them and cancelling the stamps.

Q. Then what happens?

A. Setting them over onto the sorting table—the distributing table that you distribute the [112] letters.

(Testimony of Donald W. Formhals.)

Q. (By Mr. Osborne): Let's get this straight. Is it your testimony today that you don't recall entering the men's room?

A. No, sir, I definitely don't.

Q. Isn't it true that last week when you were talking to Dr. McNeil you stated to him that you did remember?

A. I did not tell him I remembered entering the room. I remember leaving for the bath room, and that was the extent of my conversation in regards to the men's room at all.

Q. How far is it from the sorting desk to the men's room?

A. The length of this court room, I would say.

Q. Is it your testimony today that somewhere between the sorting desk and the men's room you lost your memory?

A. Well, either at the sorting desk—I [119] wouldn't say necessarily it was between. It was possibly between there, yes.

Q. It must have been somewhere between, since you remember leaving for the men's room but you don't remember arriving?

A. Yes.

Q. And your memory again returned a few minutes after you left the men's room when you were in the postmaster's office?

A. When the inspectors grabbed me when I was in the men's room, it shook me to my senses to where I recall.

Q. Mr. Formhals, perhaps I misconceived your testimony, but is it true to state that you are not

(Testimony of Donald W. Formhals.)

denying that you took these letters into the men's room; is that correct?

A. I am denying that I did it with my own knowledge.

Q. You are not denying that you physically carried them in? A. I must have.

Q. Is it also true to say that you are not denying that you must have torn up that letter?

A. It is hard to deny.

Q. You don't remember, but you are not denying it? A. It has got my signature on it.

Q. What do you mean it has your signature on it? [120]

A. I just say the same thing. To the best of my knowledge at the time I wasn't aware of it, no.

Q. You are not denying it, however?

Let's put the question this way: Outside of the postal inspectors, do you recall anyone else being in that men's room when you were apprehended?

A. I don't know whether he was in there—there was a man either in there or came in just very shortly afterwards, and they asked him to leave. Whether he was in there at the time, I couldn't tell you whether he was or not. I know there was a man who was in there later and was told to leave, that's all I know.

Q. Let me see if I can get an answer to the original question now. Isn't it true that you are not denying that you are the one that tore up the letter; you are simply saying that you don't remember?

(Testimony of Donald W. Formhals.)

A. I definitely don't remember opening the letter, no.

Q. Isn't it true to state that you are not denying that you signed these letters and that you signed this statement; you are simply stating, "I don't remember"?

A. Yes, sir, it is my signature, I must have signed them, but I definitely don't remember the incidents at the time when I was doing it, I know that.

Q. Your loss of memory is confined to a period of [121] approximately five to 10 minutes, is that not true?

A. Well, if that was the time period. I couldn't swear to the exact time. I just have no idea.

Q. Very well. It was confined to the time that you were in the men's room, is that correct?

A. Somewhere between there and the time that I left it.

Q. Going back to the events that occurred in the postmaster's office until such time as you left, you testified you recall certain questions being put to you and making certain answers, is that correct?

A. Yes.

Q. Do you recall being asked about whether or not you opened up this one letter and extracted money from there?

A. I don't remember being asked about it, no.

Q. Do you recall answering that question that you tore open one of the letters and removed two \$1.00 bills?

(Testimony of Donald W. Formhals.)

A. I don't remember answering that question to anybody, no.

Q. Do you recall being asked why you had the five other letters resting on your leg?

A. Not why I had five other letters; I was asked why I had the mail in the bath room.

Q. You recall that question? [122]

A. That question was asked.

Q. What was your answer?

A. There was no answer. I had no reason for it.

Q. In other words, when you were asked this question, it is your testimony today that you merely remained silent?

A. No. I just said at the time that I had no reason for having them in there. I was asked why the letters were in there, why I had them in there, rather, and I said I had no reason whatsoever for it. That was my answer.

Q. Then you do recall this particular question and answer. Do you recall the question being put to you about whether or not you had ever taken other letters into the men's room? A. Yes.

Q. You do recall that question?

A. Yes.

Q. Do you recall what your answer was?

A. To the best of my knowledge, I never remembered taking any mail in there. I have no reason to take mail in the bath room.

Q. In other words, your loss of memory is rather selective as to what you remember and what you

(Testimony of Donald W. Formhals.)

don't remember, is that correct? You have a spotty memory during this period? [123]

A. During the latter part of the afternoon, yes.

Q. You remember some things, but you don't remember others? A. Very true.

Q. Is it your testimony today that you don't remember signing—first let me ask for Government's Exhibit No. 1.

I show you Government's Exhibit No. 1 and ask you if you recognize this document.

A. Yes, I know what it is now.

Q. Do you recall having seen that document on June 25, 1958?

A. I don't recall seeing it. I may have seen it and not known what it was.

Q. Is that your handwriting on there?

A. Yes, I am afraid it is.

Q. Will you read what you have written on there?

A. "I have read my statement of two pages and I say that everything herein is the truth." That's the words of the typewritten line above.

Q. Is that your handwriting?

A. I am afraid it is. It looks like it. [124]

* * *

Q. (By Mr. Osborne): During the period of that conversation, did you have occasion to make any statements regarding the taking of this mail which is entitled Government's Exhibits 2-A, -B, -C, -D, -E, and -F?

(Testimony of Donald W. Formhals.)

A. I never made any statements about them. It was partially covered in the statement of charges.

Q. What was this statement of charges?

Mr. Hupp: I will object. This is irrelevant, immaterial, and not within the scope of the direct examination. [150]

The Court: The objection is sustained unless you are trying to get at an admission that was made, and if so, ask him. If that is what you are after, it is admissible, if it refers to an admission.

Q. (By Mr. Osborne): Isn't it true, Mr. Formhals, that at that time you signed a charge sheet which charged you for administrative purposes with the commission of the offense of stealing the six letters?

Mr. Hupp: Objection. This is irrelevant.

Mr. Osborne: I don't believe an admission is irrelevant, your Honor.

The Court: The objection is overruled.

Mr. Osborne: Would you answer the question, please?

The Witness: How would you state that?

Mr. Osborne: Will you read the question, Mr. Reporter?

(The question was read by the reporter.)

Mr. Osborne: The further objection, your Honor, that this is not the best evidence.

The Court: The objection is sustained. You may ask him if he signed a document at that time.

Mr. Osborne: Very well.

(Testimony of Donald W. Formhals.)

The Court: And then you may present the document to him, if you have it. That is the best [151] evidence of what is stated therein.

Q. (By Mr. Osborne): Mr. Formhals, at the time that these charges were presented to you, did you deny the charges?

A. That evening, the letter of charges?

Q. Yes.

A. I never denied, admitted, or nothing. I signed the letter.

Q. Did you read the letter that night?

A. Yes, I read it.

Q. And did you make any denial of the matter contained therein?

A. Never made any statement about it at all. No denial.

Q. Isn't it true that you simply signed a receipt for having taken a copy of the charges?

A. Yes, sir.

Mr. Osborne: Let me ask that this be marked Government's Exhibit for identification No. 4. I have given defense counsel a copy of this for his inspection.

The Clerk: Government's Exhibit 4 marked.

(The exhibit referred to was marked Government's Exhibit No. 4 for identification.)

Mr. Osborne: Do you have any objection to this?

Mr. Hupp: I most certainly do have an objection. [152] It is irrelevant and immaterial and has nothing to do with the issues of this case.

(Testimony of Donald W. Formhals.)

The Court: There isn't any question before the court to object to. He has asked to have something marked.

Mr. Hupp: He just asked me if I had any objection to the admission of this into evidence, and I do.

Q. (By Mr. Osborne): Mr. Formhals, I show you for identification Government's Exhibit No. 4 and ask you if you have seen this document before?

A. Yes, I have a copy of it myself.

Q. Do you recognize that document?

A. I have got a copy, an identical copy of it in my own file.

Q. Does your signature appear thereon?

A. Yes.

Q. Any other writing in your handwriting?

A. Yes. "I, Donald W. Formhals, have received the original copy of this letter of charges, this date of June 25, 1958. Donald W. Formhals."

Q. Does that letter contain a statement as to——

The Court: Counsel, don't ask him what the letter contains. It itself is the best evidence of what it contains. Whether it is admissible or not, there first must be a foundation for it.

It is not admissible in evidence for what it [153] states unless the document itself is admissible in evidence.

Mr. Osborne: Your Honor, at this time I would like to offer this in evidence for this reason: It has been stated to be a charge sheet and the defendant has admitted he failed to deny it.

(Testimony of Donald W. Formhals.)

The Court: Counsel, I will look at it if you are offering it in evidence.

For what purpose is it offered?

Mr. Osborne: For the purpose of showing the defendant admitted——

Mr. Hupp: I will object to counsel——

The Court: Is it offered as an admission against interest?

Mr. Osborne: Yes, by silence.

The Court: Now, I will read it and see whether it is.

The objection is sustained. He hasn't signed this document. All he has signed is, "I have received the original copy of the document."

Mr. Osborne: Your Honor, if I may make a comment on that.

Mr. Hupp: May it please the court——

Mr. Osborne: May we approach the bench on this matter?

(The following proceedings were had at the bench [154] outside the hearing of the jury:)

Mr. Osborne: Your Honor, it is my contention that this contains a statement of charges covering precisely what the indictment covers. This was presented to the defendant and the defendant has admitted that he failed to deny it, and that is an admission against interest by virtue of his silence. I submit it is a well-established rule of evidence that when a man is accused of a crime and he fails to deny it, it is an admission against that person.

(Testimony of Donald W. Formhals.)

The Court: Mr. Osborne, let me tell you the rule with respect to admissions by silence.

Admissions by silence only occur under circumstances where a denial is normally required or expected.

Mr. Osborne: That is correct.

The Court: If a person is accused of an offense under circumstances where normally they would be expected to reply, and they do not, then it is an admission by silence. But where they are handed a document—this is no more an admission than when you hand him an indictment in court. This is charges by the postal department, and it isn't any different than when you hand them a copy of an indictment. When you hand a defendant a copy of the indictment, you don't think that because he takes it and walks away and hands it to his attorney—you don't think [155] that he has admitted by silence that he has committed the offense, do you?

It is exactly the same situation. It is no admission. He simply receipted for it.

It is quite apparent that that was all that was expected of him. They didn't even ask him. They didn't give it to him in a form in which he was expected to sign it. All he was asked to do was to receipt for it.

It is no more an admission than the receipt of a pleading.

Mr. Osborne: I will offer this again at a later time. I have a different conception of the circumstances surrounding this.

The Court: The objection to its admission is sustained.

(Whereupon the proceedings were resumed in open court within the hearing of the jury, as follows:) [156]

* * *

WILLARD W. LYNCH

recalled as a witness on behalf of the government, in rebuttal, having been heretofore duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Osborne:

Q. Mr. Lynch, directing your attention to the 25th [173] of June, 1958, from 4:30 to 6:30 that evening did you have the opportunity to closely observe the appearance of the defendant?

A. Yes, sir.

Q. Did you observe—let me ask you this question: At any time during that period of time was the defendant crying? A. Was what?

Q. At any time during that period of time was the defendant crying? A. No, sir.

Q. Was he hysterical? A. No, sir.

Q. Did you notice his eyes being dilated?

A. No, sir.

Q. Later on that evening did you have occasion to see the defendant again? A. Yes.

Q. What time was that?

A. It was between 11:30 and 12:00 on the same date on June 25th.

(Testimony of Willard W. Lynch.)

Q. 11:30 and 12:00 that evening?

A. Between 11:30 and 12:00 on that date. It was still the same day of June 25th. There was an understanding that he was to meet Mr. Wilson, the postmaster, [174] and me at the designated motel for—may I give the reason here?—for the acceptance of this administrative letter of charges. And I arrived about 11:30, Mr. Wilson was there, Mr. Formhals was not. Mr. Wilson—I have never called Mr. Formhals at his home. He was summoned to the motel to meet us by Mr. Wilson.

Mr. Hupp: I object to that as not responsive to the question.

Q. (By Mr. Osborne): Are you certain of the time? A. Yes, I am.

Q. How are you certain?

A. I am certain for the reason that—it was our desire to present this administrative letter of charges within the same day, and had Mr. Formhals been present as anticipated, it would have been presented within that day. However, it was just about midnight, high midnight, at the time the letter was actually presented to the man, so it was placed as given to him on June 25th, 1958. I remember specifically I left Riverside about 10:30.

Q. When you handed this letter to the defendant, did he read the letter in your presence?

A. Yes, he did.

Q. Now, subsequent to that how long did the defendant stay in that motel?

A. Well, he stayed upwards to an hour. I would

(Testimony of Willard W. Lynch.)

say [175] to about 1:00 o'clock. Mr. Wilson, as I said, was there, too, and he commenced to leave.

Q. What time did Mr. Wilson leave?

A. I recall that I and Mr. Formhals pushed the postmaster's car, after which Mr. Formhals would seemingly persist in staying, he was very talkative.

Mr. Hupp: I ask that that be stricken.

The Court: I couldn't hear you, counsel.

Mr. Hupp: I objected to the part about persisted in something or other as a conclusion of the witness and ask that it be stricken.

The Witness: I would like to say this——

Mr. Hupp: There is no question pending now. Just a minute.

The Court: Counsel, you objected. It is in. You mean you make a motion to strike it?

Mr. Hupp: Yes.

The Court: Granted. That portion may be stricken.

Q. (By Mr. Osborne): Mr. Lynch, after the defendant left, or after Mr. Wilson left, did the defendant then remain?

A. Yes, he remained for another 10 to 15 minutes.

Q. Throughout the entire period of time while the defendant and Mr. Wilson and yourself were at the motel was [176] there any conversation concerning the embezzlement of mail by Mr. Formhals?

A. Yes. After the actual presentation of this letter, hand-to-hand receipt, and his acknowledgement on the copies of this letter, that that business was

(Testimony of Willard W. Lynch.)

dispensed, we could have all gone to bed, but I would say this meeting lasted for upwards to an hour, and I remember particularly he was very talkative. I was tired and wanted to go to bed, I was in my motel room, and——

Q. Did he discuss the embezzlement itself?

A. Yes.

Q. Do you recall what he stated?

Mr. Hupp: Wait a minute. I object on the ground this is not properly part of rebuttal testimony. It should have been brought out on direct.

The Court: The objection is sustained. It should have been brought out on direct.

Mr. Osborne: The defendant went into this later meeting. I did not.

The Court: The objection is sustained.

Q. (By Mr. Osborne): Mr. Lynch, going back again to 5:40 when the statement, Government's Exhibit No. 1, was presented to Mr. Formhals, do you recall observing the defendant during this period of time? A. Yes, sir. [177]

Q. Do you recall whether or not he took the time required to read that statement?

A. Yes, he did.

Q. Will you describe what happened?

A. He actually read it page for page, and he was requested to rise and take the little oath.

Q. Did he take the oath?

A. He certainly did in the postmaster's office. It was 5:50 p.m.

(Testimony of Willard W. Lynch.)

Q. How much time did he take in reading that statement?

A. I would say he took five to 10 minutes.

Q. Were you standing and waiting?

A. Yes. We were all in the confines of the postmaster's office.

Q. Did the defendant indicate during this period of time to you in any way that he was willing to sign anything in order to leave? A. No.

Q. What were the conditions of his leaving?

A. His leaving was just this: He left about 6:00 o'clock, which was actually about an hour and a half from the time he was initially approached. Very frankly, where we were cognizant——

Mr. Hupp: I object to anything further. [178]

Q. (By Mr. Osborne): I am asking what were the conditions.

A. The conditions were, there was an understanding that later that evening he was to meet Mr. Wilson, who desired to be present, he was the administrator of the post office, and myself, in this motel room, for the acceptance of this letter. It was understood that he was going home, he was permitted to go to his home and family, it was understood that he had a job the next morning starting at about 2:30 or 3:00 in the morning, and that he would not lose that day's work. In other cases, in cases in Los Angeles, we place the man——

Mr. Hupp: Just a moment.

The Court: Just answer the question.

The Witness: All right, sir.

(Testimony of Willard W. Lynch.)

Q. (By Mr. Osborne): Mr. Lynch, you stated you have been a postal inspector for a considerable length of time. A. 11 years.

Q. I would like to ask you to examine Government's Exhibits 2-A through -F and ask you based on your experience if there is any indication, anything on the face of those letters which would lead you to believe that they would not all be together on a sorting table in one continuous line. [179]

A. Yes, sir.

Q. What are those indications?

A. These two letters here were test letters; these four were not (indicating). These two letters were placed into the mails 10 minutes apart in different places. That means these two could not possibly have been together. These other four letters were mailed by three different patrons at different points in the city that afternoon.

Q. Have you contacted these people?

A. Yes, I have, by correspondence.

Also, here we have a different postmark on the one letter, 3:00 p.m., whereas on the other letter it is 5:00 p.m.

At the Hemet post office the postmark is changed to show each succeeding dispatch of mails. The 3:00 p.m. is followed by the 5:00 p.m., which indicates this letter was in the post office prior to 3:00 p.m., whereas these other five letters were in the post office, went through the cancelling machine some time after 3:00 but before 5:00 p.m.

(Testimony of Willard W. Lynch.)

Q. These two test letters, were they both deposited in the same drop?

A. No. The one test letter, Exhibit 2-F, was placed in the lobby drop at 3:30 p.m., Exhibit 2-A was [180] placed in the outside courtesy box at 3:40 p.m., ten minutes apart, by me.

Q. Based on your experience as a postal inspector, is it likely that those would have all been together?

Mr. Hupp: I object to this as——

The Witness: It is impossible.

Mr. Hupp: Just a minute. Don't answer the question while I am objecting, please.

I object to this as calling for a conclusion of the witness and ask that the answer be stricken.

The Court: The objection is overruled.

The Witness: These letters could not have been all as a unit of six, or even as a unit of less than six, because of five different representative mailing points in the city.

Mr. Osborne: I have no further questions.

Mr. Hupp: May I have a moment to confer with my client?

Cross-Examination

By Mr. Hupp:

Q. Inspector Lynch, with regard to this matter of the cancelling of these letters, they go through the cancelling machine before they are sorted into pigeon holes?

A. That is right. [181]

Q. After they go through the cancelling machine,

(Testimony of Willard W. Lynch.)

then aren't they sorted into various sized envelopes before they are put in pigeon holes?

A. Some places, yes; some places, no. In a place like Hemet, they should go from the cancelling machine——

Q. Do you know?

A. At Hemet they would go from the cancelling machine to the one dispatch case.

Q. Do you know whether or not they were sorted to size at Hemet?

A. I can't say that exactly at Hemet. They should not have been. Do you mean longs and shorts, is that what you are talking about? [182]

* * *

INSTRUCTIONS TO THE JURY

The jurors are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any,

against one or any of the parties; by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence. A witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness wilfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point. If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or [199] inadvertence, but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth. [200]

* * *

The Court: Has the government any objections to any instructions given or the omission of any instructions?

Mr. Osborne: I was not able to determine whether you gave an instruction fully covering the credibility of the accused and inconsistent statements as to topics.

The Court: I don't quite understand you. Are you objecting to an instruction?

Mr. Osborne: No. I don't believe that that was given, if I followed the instructions carefully, as to

judging the credibility of the defendant's testimony and the weight to be given to it, and also as to the effect of inconsistent statements.

The Court: Read into the record what you [208] are objecting to or the omission of.

Mr. Osborne: I am saying the omission of an instruction——

The Court: Read into the record the instruction, the omission of which——

Mr. Hupp: May I suggest that you keep your voice low enough so the jury doesn't hear it?

Mr. Osborne: Yes.

“A defendant who wishes to testify, however, is a competent witness and the defendant's testimony is to be judged in the same way as that of any other witness.”

And also an instruction which reads as follows:

“A witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

* * *

[Endorsed]: Filed May 12, 1959. [209]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

A.

Names and Addresses of Attorneys.

Indictment, filed 7/2/58.

Minute Order 7/21/58, re arraignment and plea.

Minute Order 7/22/58, re plea.

Defendant's Notice of Motion to continue date of trial, filed 8/12/58.

Minute Order 8/12/58, re trial.

Minute Order 12/1/58, re setting for trial.

Minute Order 12/8/58, re setting for trial.

Minute Order 1/26/59, re setting for trial.

Order Appointing Psychiatrist, filed 2/4/59.

Minute Order 2/17/59, re jury trial.

Minute Order 2/18/59, re further jury trial.

Minute Order 2/19/59, re further jury trial.

Verdict, filed 2/19/59.

Report of Edwin E. McNiel, M.D., filed 2/19/59.

Minute Order 3/9/59, re sentence.

Judgment, dated and filed 3/9/59.

Notice of Appeal, filed 3/19/59.

Substitution of Attorneys, filed 3/19/59.

Motion for Order extending time in which to file record and perfect appeal, filed 4/27/59.

Order extending time in which to file and docket record on appeal, filed 4/27/59.

Designation of Record (Appellant), filed 5/20/59.

Counter Designation of Record on Appeal (Appellee), filed 5/22/59.

B.

Two volumes of Reporter's Official Transcript of Proceedings had on: February 17, 1959—Volume I; February 18 & 19, 1959—Volume II.

C.

Plaintiff's Exhibits 1, 2-A to 2-F, inclusive; 3-A, 3-B and 4.

(Note: The exhibits are being retained in this office pending further instructions from the Clerk of the Court of Appeals—most of the exhibits being unopened letters containing money.)

Dated: May 22, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk,

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16478. United States Court of Appeals for the Ninth Circuit. Donald W. Formhals, Petitioner vs. United States of America, Respondent. Transcript of the Record. Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: May 25, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16478

DONALD W. FORMHALS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL
AND DESIGNATION OF RECORD

Comes Now the Appellant and presents a statement of points upon which he intends to rely in his appeal of the above-entitled cause to the United States Court of Appeals for the Ninth Circuit:

I.

The record is void of any competent proof that the letters Appellant is charged with embezzling in all three counts of the indictment had been placed in the United States mails.

II.

The prosecutor engaged in prejudicial conduct in his attempt to introduce as a confession of the accused the signing by the accused of the statement of charges made by the Post Office Department.

III.

The prosecutor was guilty of misconduct in introducing evidence regarding "prior offenses" of the accused knowing that none existed.

IV.

Evidence was wrongly admitted into evidence in regards to the system of handling the mail at the Post Office Department at Hemet for no foundation was made or any showing made that the witness testifying as to the system had knowledge of the same.

V.

Upon hearing evidence in the case that the Appellant was suffering from amnesia in regards to the offense, the Court failed to make a determination as to whether or not the Appellant had a sufficient memory in regards to the facts of the case so as to enable him to effectively co-operate with his counsel in the defense of the case.

VI.

The Court unduly limited the cross-examination of the prosecution witness Wilson relating to the issue of intent of the Appellant.

VII.

The Court failed to instruct the jury in regards to the Appellant as a witness.

* * *

Respectfully submitted,

ANDERSON, ADAMS &
BACON and
THOMAS E. KELLET,

By /s/ ROBERT L. BACON,
Attorneys for Appellant.

[Endorsed]: Filed July 2, 1959.

